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No.

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IN THE

Supreme Court of the United States

CARLOS E. RODRIGUEZ-PEREZ; CARMEN ORTIZ-LOPEZ; CONJUGAL PARTNERSHIP RODRIGUEZ-ORTIZ, PETITIONERS

v.

ESSO STANDARD OIL COMPANY (Puerto Rico), a Puerto Rico Corporation,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the First Circuit (First Circuit and/or Court of Appeals hereinafter) went beyond the principle that a decision to dismiss a cause of action with prejudice should be taken with the thought in mind of equity towards all the parties involved in affirming a ruling by the United States District Court for the District of Puerto Rico (Honorable Justo Arenas, Magistrate Judge) (District Court hereinafter) which, in essence kept jurisdiction over a cause of action that though it was alleged in the complaint, was not litigated at all in any of the motions filed for summary judgment, with the sole intention of dismissing a counterclaim with prejudice which was solely a state jurisdiction claim, under the excuse of considering it a supplemental jurisdiction of the RCRA claim, thus causing the petitioners irreparable damage; constituting a clear abuse of discretion, because shortly after it renounced the jurisdiction over the RCRA claim.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as ESSO Standard Oil Company (Puerto Rico, a Puerto Rico Corporation v. Carlos E. Rodriguez-Perez, Carmen Ortiz-Lopez, Conjugal Partnership Rodriguez-Ortiz; Carlos M. Belgodere-Pamies, Janet Roe, Conjugal Partnership Belgodere-Roe; Estate of Pagan-Pagan, entered as judgment on June 14, 2006. It is reproduced in the Appendix at App. 1a. The opinion of the District Court granting respondent's motion for summary judgment against the counterclaim dated October 1, 2004 and the order dismissing the counterclaim with prejudice dated January 20, 2005 are unreported and they are reproduced in the Appendix at App. 2a and 3a.

JURISDICTION

The Court of Appeals Judgment was entered on June 14, 2006. A timely petition for rehearing to the same panel was filed on June 27, 2006. See Motion For Reconsideration To The Same Panel. An order of the Court amending to clarify a point in the petition for rehearing and denying the petition for rehearing was entered on July 28th, 2006. Appendix at App. 4a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioners seek review of the ruling of the First Circuit Court of Appeals which affirmed a decision of the District Court dismissing a counterclaim with prejudice, after keeping jurisdiction over a cause of action which was never litigated before it in any of the motions filed for summary judgment, even though it was alleged in the complaint, and then renouncing the jurisdiction over such cause of action shortly after. It did so under the excuse of considering the counterclaim a supplemental jurisdiction even though it was really a state action. The opinions granting the summary judgment against the counterclaim were dictated without jurisdiction pursuant to Cooper Industries, Inc. v. Aviall Services, Inc. 125 S.Ct 577 (2004). Nevertheless, the District Court kept jurisdiction over the cause of action under RCRA, even though none of the motions for summary judgment filed by both parties ever mentioned the RCRA cause of action, in order to dismiss petitioners counterclaim. Shortly after, the District Court renounced its jurisdiction over the RCRA claim.

That action clearly shows a clear abuse of discretion because the District Court had lost jurisdiction over the CERCLA cause of action, which was the main issue in all the motions for summary judgment filed by the parties. The District Court should have dismissed the counterclaim without prejudice, especially when it lacks an independent basis of federal jurisdiction, specifically when state issues substantially

predominated. "When it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims **may be dismissed without prejudice and left for resolution to state tribunals.**" 86 S.Ct. at 1139, 383 U.S. at 726-727. Emphasis added.

REASONS FOR GRANTING THE PETITION

A. Review is warranted because the Court of Appeals decision encourages the federal courts to abuse their discretion when dismissing a state action with prejudice under the supplementary jurisdiction of federal causes of action which have not been litigated before them, even though alleged in the complaint.

The circumstances presented by this case provide a clear opportunity for this Court to add further order and guidance to the federal courts in the use of discretion when dismissing state predominant counterclaims with or without prejudice, specifically when the supplemental jurisdiction was based on a federal cause of action that was never litigated before them, even though alleged in the complaint, and soon after the Court renounced without prejudice such cause of action.

It is obvious that in this case the District Court abused its discretion in rendering the final opinion and order dismissing petitioners counterclaim with prejudice. Let us see:

To begin with Respondent ESSO's Second Amended Complaint brought up the original cause of action under Section 113(f) of the Comprehensive Environmental Response, Compensation and Liability

Act of 1980 as amended, 42 U.S.C. Section 9601 et seq. (CERCLA) and under Section 7002 (a) (1) (B) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as further amended by the Hazardous and Solid Waste Amendments of 1984 ("RCRA"), 42 U.S.C. Section 6972 (a) (1) (B). Respondent requested in the cause of action, (1) the allocation among Respondent and Petitioners and any other persons found to be liable for all response costs incurred at or with respect to the La Vega Station pursuant to Section 113(f)(1) of CERCLA, 42 U.S.C. Section 9613(f)(1); (2) entering a declaratory judgment pursuant to Section 112(g)(2) of CERCLA, 42 U.S.C. Section 9613(g)(2), against Petitioner and in favor of Respondent declaring, adjudging, and decreeing that Petitioners are liable to Respondent for response costs at the La Vega Station, such judgment to be binding on any subsequent action or actions to recover further response costs; (3) awarding Respondent interest and costs of suit, including reasonable attorneys' fees and experts' fees; (4) ordering Petitioner to investigate, abate and remediate any endangerment posed by the La Vega Station and to comply, at their expense, with the EQB's and other regulatory agencies' demands regarding the La Vega Station; and (5) awarding Respondent any other such relief as the Court may deem just and proper. As far as requesting any thing under RCRA Respondent ESSO only requested an injunctive relief from Petitioners. Please see Second Amended Complaint, Appendix Brief for Appelant pages 41 to 61.

It is very interesting to bring to the attention of this Honorable Supreme Court of the United States that all the motions for summary judgment that were filed by Respondent ESSO and by Petitioners were all under CERCLA. Please see Respondent's Motion for Partial Summary Judgment that Petitioners are Liable under CERCLA, Docket No. 228; Appendix of Brief for

Appellant pages 62 to 87 ; Respondent's Motion for Summary Judgment on Petitioners Counterclaims, Docket No. 229, Appendix of Brief for Appellant pages 109 to 129; Motion for Summary Judgment, Docket No. 235, Appendix pages 130 to 164 and Respondent's Opposition to Petitioners' Motion for Summary Judgment, Docket No. 240, Appendix of Brief for Appellant pages 165 to 190. As this Honorable Supreme Court can clearly see and specifically in Respondent's Motion for Summary Judgment on Petitioners' Counterclaim, **not even once** the injunctive relief requested upon RCRA in the complaint was mentioned. Respondent refers to a state action in that document and not of a compulsory counterclaim under RCRA. This was so because **the Puerto Rico EQB since 1998 has been litigating all the actions under CERCLA and RCRA way before Respondent filed the complaint in the case at bar.**

In the Opinion and Order dated October 1, 2004 by Chief U.S. Magistrate Judge, Justo Arenas, **not even once** was RCRA ever mentioned, only CERCLA. Please see Opinion and Order, Docket No.250, Appendix of Brief for Appellant pages 191 to 231. It is very obvious that all those motions for summary judgment were evaluated by the Honorable District Court for the District of Puerto Rico **exclusively under CERCLA,** including Respondent's Motion for Summary Judgment on Petitioners' Counterclaim. There is no doubt that such counterclaim, since it did not have original federal jurisdiction, being only a state cause of action, was a compulsory one created by the Respondents cause of action under CERCLA.

We will now proceed to discuss whether the District Court after determining that it did not have jurisdiction over the main cause of action in the complaint (CERCLA), abused or not its discretion **when it selected only the counterclaim to dismiss it with**

prejudice. Prior to the Supreme Court's decision of Cooper Industries, Inc. v. Aviall Services, Inc. 543 U.S. _____ 2004, see Appendix of Brief for Appellant pages 232 to 250, Petitioners filed a series of motions requesting the opinion and order of October 1, 2004 be vacated and submitted evidence that clearly showed that the **counterclaim** was not time barred.

In one of those motions Petitioners requested sanctions to be applied to Respondent for not disclosing two letters, which clearly demonstrated that the statute of limitations was interrupted in the state action. One of the motions filed by Petitioners was the Motion Requesting Sanctions under Rule 11. Please see **Motion for Sanctions, Docket No. 267, Appendix of Brief for Appellant, pages** 251 to 301. The Honorable District Court denied such motion, did not take into consideration any of the new evidence submitted, granted all the Summary Judgment Motions filed by Respondent and denied the one filed by Petitioners. On January 20, 2005 Chief U.S. Magistrate Judge, Justo Arenas, issued another Opinion and Order, Docket no. 283, Appendix of Brief for Appellant, pages 324 to 350 denying all the motions filed by Petitioners even though it had no jurisdiction over the main cause of action (CERCLA) at that time, pursuant to Cooper Industries, Inc. v. Aviall Services, Inc. Supra. In the last page of that Opinion and Order the Honorable District Court expressed the following:

> **"On December 13, 2004, the United States Supreme Court reversed the Fifth Circuit, Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S. Ct. 577 (2004). The court's majority Held a private party who has not been previously sued under Sections 106 or 107(a) of CERCLA, cannot obtain Contribution under section 113(f) (1) from**

> **other liable Parties. This determination by the Court directly impacts the present litigation since ESSO is seeking contribution from the co-defendants under section 113(f), but it has not been previously sued under section 107(a) or subjected to a proceeding under section 106 of CERCLA. In view of the above, ESSO is ordered to Show Cause, if any there be, why its section 113(f) contribution claim should not be dismissed. So ordered. At San Juan, Puerto Rico, this 20th day of January. Emphasis added.**

It is very interesting for this Honorable Supreme Court of the United States to consider two undisputable facts: 1) The District Court for the District of Puerto Rico already knew on January 20, 2005 that it did not have any jurisdiction to try the case at bar under CERCLA, and 2) In spite of the knowledge, **ordered Respondent ESSO to show cause** ~~why its~~ Section 113(f) should not be dismissed. It is clear that the Honorable District Court for the District of Puerto Rico gave Respondent ESSO the opportunity to file a voluntary dismissal of the CERCLA action, which at the end would have to be without prejudice. On that same date the District Court for the District of Puerto Rico issued a Partial Judgment dismissing the **counterclaim** of Petitioners-Appellants, Carlos E. Rodriguez Perez, Carmen Ortiz Lopez and their conjugal partnership, **with prejudice**. Please see Partial Judgment, Docket No. 285, Appendix Brief for Appellant page 351. It is very obvious that the District Court for the District of Puerto Rico entered that partial judgment without having the jurisdiction over the CERCLA case to do so, and without giving Petitioners the opportunity to file a voluntary dismissal, which at the end would have had to be without prejudice. This

clearly shows an abuse of discretion from the Honorable District Court for the District of Puerto Rico. Be it known by this Honorable Supreme Court of the United States that Petitioners were not notified of this partial judgment until February 18, 2005. On February 3rd, 2005, Respondent filed a Motion for Voluntary Dismissal Without Prejudice the Second Amended Complaint, Docket No. 291, Appendix Brief for Appellant pages 448 to 453. On February 4th, 2005 Petitioners filed Motion for Voluntary Dismissal of Third Party Complaint without Prejudice under Rule 41 (A) (2), Docket No. 292, Appendix Brief Appellant pages 454 to 456. On February 8th, 2005 the District Court for the District of Puerto Rico issued an Opinion and Order and a Judgment. Please see Docket No. 296, Appendix pages 457 to 461. In such Opinion and Order, on pages 2 and 3, Appendix pages 457 to 461 the Honorable District Court expresses:

> **"In this case, ESSO's contribution cause of action is brought under section 113(f) of CERCLA, 42 U.S.C. Section 9613(f). The Supreme Court has recently decided that a Private party such as ESSO, who has not been sued under Sections 106 or 107 of CERCLA, cannot obtain contribution from other liable parties under section 113(F). Cooper Indus., Inc. v. Aviall Servs., Inc. 125 S. Ct. 577 (2004). Therefore, it is now clear that this court lacks jurisdiction over the subject matter of ESSO's CERCLA contribution claim.**
>
> **Esso admits as much in its motion for voluntary dismissal, (Docket No. 191 at 2.) consequently, dismissal of the cause of action for contribution under CERCLA will be with prejudice. I disagree, however, that**

the cause of action for injunctive relief asserted by ESSO under the RCRA has to be dismissed with prejudice. Such cause of action will be dismissed without prejudice as will the third-party complaint filed by co-defendants Rodriguez and Ortiz against the Estate of Pagan Pagan."

Later, on February 20 2005 Petitioners filed a Motion to Vacate Judgment under Rule 60 (b) (4) and 41(a) (2). On February 22nd, 2005 Respondent-Appelle ESSO filed a Motion to Amend or Alter Judgment Pursuant to FRCivP 59(2), and/or for Additional Findings Pursuant to FRCivP 52(b) (Docket No. 302). Please see Appendix pages 478 to 483. On page 2 of such motion even Respondent ESSO brings to the attention of the Honorable District Court of Puerto Rico **the fact that not having jurisdiction and dismissing with prejudice are mutually exclusive**. Please see Respondent's Motion to Amend or Alter Judgment Pursuant to FRCivP 59(e), and/or for Additional Findings Pursuant to FRCivP 52(b) (Docket No,. 302) pages, 2 (paragraph 5), page 4 (paragraphs 11, 12, 13), page 5 (end of paragraph 13), Appendix Brief for Appellant pages 478 to 483.

On March 21, 2005 the Honorable District Court for the District of Puerto Rico amended the judgment dismissing the Second Amended Complaint filed by Respondent ESSO Standard Oil Company (Puerto Rico) against Petitioners Carlos E. Rodriguez Perez, his wife Carmen Ortiz Lopez, the conjugal partnership formed by both, Carlos M. Belgodere Pamies, his wife "Jane Roe" and the conjugal partnership formed by both WITHOUT PREJUDICE.

The Honorable District Court of Puerto Rico completely abused its discretion in dismissing all the actions in the above captioned case without prejudice,

except the counterclaim which was dismissed with prejudice even though it lacked jurisdiction in the CERCLA case. It is very important to bring to the attention of this Honorable Supreme Court of the U. S. that in the Judgment, Opinion and Order dated **February 8, 2005** the Honorable District Court for the District of Puerto Rico dismissed the cause of action for injunctive relief under RCRA filed by Respondent ESSO without prejudice. Please see Judgment, Opinion and Order, February 8, 2005 (Docket No. 296). Please See Appendix Brief for Appellant pages 460 to 461. We really have to wonder why if the Honorable District Court for the District of Puerto Rico dismissed the cause of action under RCRA without prejudice; it had to dismiss the counterclaim with prejudice under the unjust excuse that it kept the jurisdiction under RCRA. Rule 60(b) reads as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons (1) mistake, inadvertence, surprise or **excusable neglect;**
> (2)...
> (3)...
> (4) ...
> (5)...; or
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspends its operation. This rule does not limit the power

of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant a relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill or review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

As amended Dec. 27, 1946, eff. March 19, 1948; [1] Dec. 29, 1948, eff.
Oct. 20, 1949. [2]

Rule 41(a) 2 reads as follows:

(a) Voluntary Dismissal...
(2) By order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. **If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court..** Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice." Emphasis added.

On January 20th 2005 this Honorable Court issued a partial judgment that reads as follows:

> "There being no just reason for delay, Partial Judgment is hereby entered dismissing the counterclaim of co-defendants Carlos E. Rodriguez Perez, Carmen Ortiz Lopez and the conjugal partnership formed by them against plaintiff ESSO Standard Oil Co. (Puerto Rico) with prejudice." Emphasis added. Please see Docket No. 287.

That partial judgment is a dismissal on Motion under Rule 41(a) (2) and is within the sound discretion of the court, **and its order is reviewable only for abuse of discretion**. "American Cyanamid Co. v. McGhee, C.A.5th, 1963 317 F.2d 295. Moore v. C.R. Anthony Co., C.A. 10th, 1952, 198 F.2d 607. Westinghouse Elec. Corp. v. United Elec. Radio & Mach. Workers of America, C.A.3d, 1952, 194 F.2d 770, certiorari denied 72 S.Ct. 1060, 343 U.S. 966, 96 L.Ed. 1362. Ockert v. Union Barge Line Corp., C.A.3d, 1951, 190 F.2d 303.

> "The defendant argues that some of the reasons for overruling the motion stated by the trial court in its opinion and comment at the hearing are invalid and do not support the order. This court cannot inquire into and examine the mental operations of the trial court in its exercise of a discretionary power. On such an appeal as this we are limited to a consideration of whether **the order itself constitutes an abuse of discretion in that it infringes the legal or equitable rights of the defendant as shown by the circumstances and facts conceded or undisputed.**" Home Owners Loan Corp. v.

Huffman, C.C.A. 8th, 1943 134 F.2d 314, 318. Emphasis added.

The discretion given the court by Rule 41(a) (2) **is a judicial, rather than an arbitrary discretion.** "Alamance Indus., Inc. v. Filene's C.A.1st, 1961, 291 F.2d 142, certiorari denied 82 S.Ct. 53, 368 U.S. 831, 7 L..Ed.2d 33. International Shoe Co. v. Cool, C. C.A.8th, 1946, 154 F2d 778. Home Owners' Loan Corp. v. Huffman, C.C.A.8th, 1943, 134 F.2d 334. McLean v. Wabash R.Co., D.C.Mo. 1943, 3 F.R.D. 172. Lawson v. Moore, D.C. Va.1939, 29 F.Supp. 175.

> "Here the court has an express **judicial function** to perform. All of the concepts and processes of judicial determination are brought into play. The merits of each motion must be considered and a ruling made by the court. There is no language under this section which pre-ordains the ultimate judicial decision on a motion made under its terms." American Cyanamid Co. v. McGhee, C.A.5th, 1963, 317 F.2d 295, 298. Emphasis added.

> "Since the matter of voluntary dismissal of a suit is to be determined in the sound discretion of the court, all the facts must be considered and all equities weighed and a refusal to consider any equities of plaintiff would be a denial of a full and complete exercise of judicial discretion. Lunn v. United Aircraft Corp., D.C.Del. 1960, 26 F.R.D. 12."

Courts have ruled that if necessary **a hearing should be held** and the court should endeavor to **insure substantial justice to both parties.** (Emphasis added) Please see: The District Court never scheduled a hearing therefore the counterclaim was not

fully litigated.[1] Cass v. Pacific Fire Ins. Co., D.C. Mo. 1947, 7 F.R.D. 348. Lunn v. United Aircraft Corp., D.C. Del.1960, 26, F.R.D. 12. Roth v. Great Atl. & Pac. Tea Co., D.C.Ohio 1942, 2 F.R.D. 182.

> "A motion for voluntary dismissal by order of court is addressed to sound discretion of court with relief to be awarded consistent with justice and equity, and decision is to be made in accordance with what would be fairest and **cause the least hardship to the parties**. Therrien v. New England Tel. & Tel. Co., D.C.N.H.1951, 102 F.Supp. 350. Emphasis added.

"Rule 41 (a) discloses intent to leave matter of dismissal to sound discretion of trial court upon consideration of rights of parties and how they will be affected and what benefits or injuries may result. Colonial Oil Co. v. American Oil Co., D.C.S.C.1943, 3 F.R.D.29."

On January 20, 2005 the Honorable Court issued an order to Respondent ESSO to show cause, if there be reason why its Section 113(f) Contribution Claim should not be dismiss. Please see Docket No. 286. Appendix pages 349. It is very clear that the Honorable District Court **did not endeavor to insure substantial justice to both parties when it issued a partial judgment dismissing the counterclaim of Petitioners Rodriguez Et Als with prejudice when at the same time issued an Order to Show Cause against Respondent ESSO giving Plaintiff-Appellee the opportunity to file a voluntary dismissal without prejudice**. Such opportunity was not given to Petitioners Rodriguez et. al.; therefore, by doing that, the

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[1] The counterclaim was decided exclusively on the motions for summary judgment without a single hearing scheduled.

Honorable District Court showed a **definite abuse of discretion.** In the partial judgment this Honorable Court expresses that there being no just reason for delay; partial judgment was entered dismissing the counterclaim of Petitioners with prejudice. If there was no just reason for delay to dismiss the counterclaim, there could not have been a just reason for delay in dismissing Respondent ESSO's claim. Yet, Respondent ESSO was given the opportunity to file for voluntary dismissal without prejudice, but Petitioners **were not given the same opportunity.** In the judgment issued by the Honorable District Court on February 8th, 2005 it dismissed plaintiff's cause of action for contribution under Section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act with prejudice. However, it was with prejudice because Respondent ESSO in his Motion for Voluntary Dismissal could not prove to this Honorable Court that their cause of action could be further litigated in **another court with jurisdiction.** That is not the case of counterclaimants Petitioners Rodriguez et.al. because their cause of action was filed in the Bayamon Superior Court, case No. DDP2002-0330, which was paralyzed until the above captioned case is finally decided. This was done even though that cause of action had been filed prior to this cause of action in several state courts, namely first in Bayamon, then in Aibonito, then in Comerio and from there it was removed to Bayamon again; therefore there is no doubt that that cause of action has been litigated in the state courts which have jurisdiction over the subject matter. In the Opinion and Order of February 8, 2005 the Honorable District Court declares itself without jurisdiction in the above captioned case because of the decision of **Cooper Industries, Inc. v. Aviall Servs., Inc.** 125 S.Ct. 577 (2004). Please see Docket No. 296. Therefore, it is quite clear that this Honorable Court **lacked subject matter**

jurisdiction over the counterclaim as well since it was litigated under CERCLA. In cases where the court lacks subject matter jurisdiction the counterclaim cannot be dismissed with prejudice. The second sentence of Rule 41(a) (2) states a useful, though extremely limited principle. It provides that if a counterclaim has been pleaded by defendant **prior to the service upon him of the plaintiff motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.** However, even if the counterclaim could stay pending, the District Court should not award it because **it is a predominant state action**. Therefore, with all respect the Honorable District Court should not have dismissed the counterclaim with prejudice. At the same time it is **causing the Petitioners irreparable damages if they cannot litigate their cause of action in another court with jurisdiction, as Petitioners Rodriguez et.al. have the right to do it.**

A dismissal under Rule 41(b) or any other dismissal not provided for in rule 41 operate as an adjudication on the merits unless the court otherwise specifies **or the dismissal is for lack of jurisdiction,** improper venue, or failure to joint a party under Rule 19. Thus it is, in the phrase commonly used by the courts, "with prejudice." A decision of the trial court to dismiss with prejudice **may be reviewed and appealed and the dismissal order to be without prejudice**. (Emphasis added) "Developers Small Business Inv. Corp. v. Hoeckle, C.A.9th, 1968, 395 F.2d 80, 83. American Needle & Novelty Co. v. Schuessler Knitting Mills, Inc. C.a.7th, 1967, 379 F.2d 376. Lucking v. Ojai Mut. Water Co., C.A.9th, 1958, 256 F.2d 403. Thomas v. Furness (Pac) Ltd., C.A.9th, 1948, 171 F.2d 434, certiorari denied 69 S.Ct. 1522, 337 U.S. 960, 93 L.Ed. 1759. See Section 2369 nn 69,75. Costello v. U.S. 1961, 81

S.Ct.534, 365 U.S. 265, 5 L.Ed.2d 551. Myers v. Westland Oil Co., D.C.N.D. 1949, 96 F.Supp. 667. Sachs v. Ohio Nat. Life Ins. Co. C.C.A.7th, 1945, 148 F.2d 128, 158 A.L.R. 688, certiorari denied 66 S.Ct. 92, 326 U.S. 753, 90 L.Ed.452. Eldridge v. Richfield Oil Corp., D.C. Cal.1965, 247 F.Supp.407, affirmed C.A.9th, 1966, 364 F.2d 090, certiorari denied 87 S.Ct. 750, 385 U.S. 1020, 17 L.Ed.556. Williams v. Minnesota Mining & Mfg. Co., D.C.Cal.1953, 14 F.R.D. 1. Sanderson v. Postal Life & Casualty Ins. Co., D.C.Mo.1942, 2 F.R.D.203.

The partial judgment was notified by the Honorable District Court to every party, except the Petitioners. This was due to the fact that without Petitioners' lawyer's knowledge, they had removed him from the notification list. This was not found until the lawyer went personally to the Clerk's office inquiring why he has not been notified of the documents in the above captioned case. This was on February 11, 2005. On that same date he requested to be included again in the notification list. On February 18, 2005 Attorney Alvarado received a notification from Ms. Rebecca Narvaez informing him that he had been reactivated to receive notifications in the above captioned case. She included the copies of all the orders (documents) that the case generated from the moment that he filed the motion assuming legal representation in the above captioned case, among them was the Partial Judgment (Docket 287) issued by this Honorable Court on January 20th, 2005. As this Honorable Supreme Court can see, based on Rule 60(b) (1) a motion to relief from judgment or order proceeds, because Petitioners did not file their motion before, due to the excusable neglect mentioned.

As it is recognized in many cases, a motion for relief from a judgment under Rule 60(b) is addressed to the discretion of the court, although there **are some**

situations so extreme that the result is foreordained and it would be an abuse of discretion either to grant relief or to deny relief. Appellate review is limited to determining whether the district court abused its discretion. (Emphasis added).

> "Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b). A number of cases say that discretion ordinarily **should incline toward granting rather than denying relief,** especially if no intervening rights have attached in reliance upon the judgment **and no actual injustice will ensue."** Wright and Miller, Federal Practice and Procedure, Volume 11, page 158. Emphasis added. "Bros Inc. v. W. E. Grace Mfg. Co., C.A.5th, 1963, 320 F.2d 594, 608, citing Barron & Holtzoff (Wright ed.). Assmann v. Fleming, C.C.A.8th, 1947, 159 F.2d 332. Neagle v. Brooks, 1969, 454 P.2d 544, 548, 203 Kan. 323, quoting Barron & Holtzoff (Wright ed.)."

"Relief provided by the rule governing relief from a judgment or order is **equitable in nature** and is to **be administered upon equitable principles.** Di Vito v. Fidelity & Deposit Co. of Maryland, C.A.7th, 1966, 361 F.2d 936. Emphasis added.

Granting of relief under this rule providing for relief from judgment or order because of mistake or excusable neglect is **subject to general rules of equity** and one ground of refusal is that of contributory fault when one has failed to use care to protect his interests or after ascertaining facts fails promptly to seek redress. Carrethers v. St. Louis-San Francisco Ry. Co., D.C.Okl.1967, 264 F.Supp. 171." Emphasis added.

In one case the Second Circuit held that on a motion 21 days after judgment, pointing out that the decision was erroneous in the light of a Supreme Court decision handed down 11 days after the judgment, relief from the judgment **should have been granted.**

In the second circuit case cited by Wright and Miller, the Supreme Court decision was handed down eleven days after the judgment. In our case the Supreme Court decision was handed down more than thirty days before the judgment was entered. Therefore, the Honorable District Court **knew it lacked jurisdiction in the CERCLA case and should not have dismissed the counterclaim case with prejudice**. That is the reason why the motion for relief from judgment should have been granted.

The Honorable District Court for the District of Puerto Rico supported its decision to dismiss the counterclaim with prejudice on the fact that it retained federal question jurisdiction over the cause of action for injunctive relief under RCRA, and consequently over any and all supplemental claims by virtue of 28 U.S.C. Section 1667. It further states that there cannot be serious disputes that the court had original federal question jurisdiction over the RCRA claim and accordingly supplemental jurisdiction over the state law counterclaim. It seems that the Honorable District Court unjustly retained the jurisdiction over the RCRA claim with the sole intention to dismiss with prejudice the counterclaim, **which had original state law jurisdiction, and started to be litigated prior to Respondents filing the complaint under RCRA**. We respectfully come to this conclusion because the Honorable District Court retained the jurisdiction under RCRA, dismissed the counterclaim with prejudice and shortly afterwards dismissed the cause of action under RCRA without prejudice. The decision to dismiss the counterclaim with prejudice caused irreparable

damages to Petitioners because if it becomes final and firm they would not be able to continue their litigation in the state courts, where the original jurisdiction of the counterclaim exists.

Petitioners Compulsory Counterclaim does not have an independent federal jurisdiction since it is only a state claim or a non-federal jurisdiction case.

Therefore, the Honorable District Court abused its discretion when it dismissed it with prejudice after realizing that it did not have any jurisdiction over the CERCLA cause of action and only retained jurisdiction, we repeat, with the sole intention of dismissing the compulsory counterclaim with prejudice. Please see:

> "Where none of counterclaims had federal jurisdictional basis independent of complaint and no diversity jurisdiction was, or could be, alleged, counterclaims could not stand following dismissal of complaint. DHL Corp. v. Loomis Courier Service, Inc., C.A.Cal.1975, 522 F.2d 982."

> "Compulsory counterclaims are required to be dismissed only when complaint is dismissed for want of jurisdiction, and counterclaim persisted where it was supported by independent ground of federal jurisdiction. Pioche Mines Consol., Inc. v. Fidelity-Philadelphia Trust Co., C.A. Nev.1953, 206 F.2d 336, certiorari denied 74 S.Ct. 225, 346 U.S. 899, 98 L.Ed. 399." Emphasis added.

> "Whenever a primary claim is dismissed for want of federal jurisdiction, any counterclaims raised, be they permissive or compulsory, must themselves be supported by independent federal jurisdictional grounds. Burns v. Rockwood Distributing Co., D.C.Ill.1979 481 F.Supp 841."

"Generally, when a complaint is dismissed for lack of federal jurisdiction, any compulsory counterclaims, because they arise out of the same transaction as the original claim, also will be dismissed; however, if an independent jurisdictional basis exists the court is not precluded from determining the merits of the counterclaim despite dismissal of the primary claim. Burns v. Rockwood Distributing Co., D.C.Ill, 1979, 481 F. Supp. 841."

"Compulsory counterclaims lacking independent grounds of jurisdiction must be dismissed if plaintiff's claim is dismissed for lack of federal jurisdiction. U. S. for Used and Benefit of T Square Equipment Corp. v. Gregor J. Schaefer Sons, Inc., D.C.N.Y. 1967, 272 F. Supp. 962."

B. The Court of Appeals decision not to entertain the abstention argument raised up by Petitioners was completely erroneous.

The First Circuit Court of Appeals expressed that the demand for abstention came more than three and a half years after Respondent's RCRA claim was first filed in District Court, and more importantly after Petitioners had litigated the state law counterclaims on the merits, culminating in a magistrate judge's summary judgment ruling on those counterclaims. It is very important for this Honorable Supreme Court of the United States to know that the state law counterclaims were not litigated on the merits, actually the magistrate judge never scheduled a hearing to litigate those counterclaims on the merits, they were decided only on the motions filed under CERCLA cause of action, which due to the Cooper vs. Aviall decision Supra, the District Court had

lost its jurisdiction. Therefore, it does not matter that the Burford Doctrine was not brought up when the RCRA claim was first filed in the District Court because the decisions on the motions for summary judgment litigated under CERCLA were dictated without jurisdiction.

PRIMARY JURISDICTION AND ABSTENTION

The primary jurisdiction and abstention doctrines concern the relationship between federal courts and the states. The primary jurisdiction doctrine allows a federal court to defer, on "a matter extending beyond the conventional experiences of judges or falling within the realm of administrative discretion, **to an administrative agency with more specialized experience, expertise, and insight.** Please see Williams Pipeline Co. v. Empire Gas Corp., 76 F.3d 1491, 1496 (10th Cir. 1996). The abstention doctrine holds that:

> "Where timely and adequate state-court review is available, a federal court sitting in equity **must decline to interfere with the proceedings or orders of state administrative agencies**: (1) when there are "difficult questions of **state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar** {;}"or (2) where the "exercise of federal review of the question in a case and in similar cases **would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."** Emphasis added.

The same doctrine was brought up by Respondent ESSO in another case arising from the same facts that gave

rise to the cause of action in the above captioned case. Respondent ESSO in the case of Carmen Elizabeth Marrero Hernandez, et al, v. ESSO Standard Oil Company (Puerto Rico), a Puerto Rico Corporation v. Carlos Rodriguez Perez, et al. , Civil Action No. 03-1485 (JAG) and Civil Action No. 03-1485 (JP), Hon. Jay A. Gregory-Garcia, U.S. D. J. and Hon. Gustavo Gelpi, U.S.M.J., filed a motion entitled Defendant/Third-Party Plaintiff ESSO'S Opposition to Plaintiffs' Motion for a Preliminary Injunction and Evidentiary Hearing (DKT . No. 122). Please see docket number 312, Appendix Brief Appellant pages 502 to 557. On pages 6 to the top of 16 of that motion Respondent ESSO requested that the United States District Court for the District of Puerto Rico should apply the Burford Abstention Doctrine in the mentioned case and that it should not interfere with the Puerto Rico EQB's primary jurisdiction, and should abstain from interfering in its corrective action in relation to the facts that gave rise to the cause of action in the case at bar. As this Honorable Supreme Court can clearly see Respondent ESSO had requested this case from the Honorable District Court not to abstain from interfering in a state action such as the Petitioners counterclaim was, because definitely it benefits them. Nevertheless in the other case mentioned 03-1485, they are requesting the United States District Court for the District of Puerto Rico to abstain from interfering with the Puerto Rico EQB'S corrective action. Respondent ESSO has definitely **assumed contradictory positions** in relation to the same facts that gave rise to the cause of action at the case at bar.

C. The Court of Appeals' decision undermines this Court's decision in 86 S.Ct. at 1139, 383 U.S. at 726-727.

In the case of 86 S.Ct. at 1139, 383 U. S. at 726-727 this Honorable Supreme Court established:

> "Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims **may be dismissed without prejudice and left for resolution to state tribunals.**" 86 S. Ct. at 1139, 383 U.S. at 726-727. Emphasis added.

Since the Honorable District Court had no basis for federal jurisdiction over Respondent's CERCLA claim, it cannot proceed to adjudicate a compulsory counterclaim that does not have an independent jurisdictional basis. Please also see:

"A compulsory counterclaim lacking independent grounds of jurisdiction must be dismissed if plaintiff's claim is dismissed for lack of federal jurisdiction. U.S. for Use & Benefit of T Square Equip. Corp. v. Gregor J. Schaefer Sons, Inc., D.C.N.Y.1967, 272 F.Supp. 962."

There is no doubt that Petitioners counterclaim is a compulsory one that had no basis for federal question jurisdiction. Therefore, since the amended complaint was based on CERCLA, a federal claim which resulted not substantial to be the basis for federal question jurisdiction, there can be no pendent jurisdiction of other claims. Please see:

"In considering a question of pendent jurisdiction over nonfederal claims the substantiality of the federal claim is to be determined on the basis of the pleadings and not upon the evidence that ultimately will be introduced at trial, and the substantiality of the federal claim will be denied only when it appears to be plainly unsubstantial on its face or obviously without merit." Tully v. Mott Supermarkets, Inc., D.C.N.J. 1972, 337 F. Supp. 834. Emphasis added.

Also see:

"Whether federal claims are substantial for purpose of pendent jurisdiction **is to be determined on basis of pleadings, not upon the evidence ultimately introduced at trial.**" Hirsch v. duPont, D.C.N.Y. 1975, 396 F.Supp. 1214, affirmed C.A.2d, 1977, 553 F.2d 750. Emphasis added.

There is no doubt from the face of the amended complaint that the Honorable District Court did not have subject matter jurisdiction original, supplemental, ancillary or otherwise over Petitioners counterclaim and, it should not have disposed of it the way it did, namely with prejudice. The dismissal of this counterclaim should have been without prejudice, especially as we said before; **the claim lacked an independent basis of federal jurisdiction,** after the federal claim on which jurisdiction is based, was dismissed for want of jurisdiction. Even, if the federal claim is not dismissed before trial, the pendent claim should be dismissed without prejudice **if state issues substantially predominate** or if the possibility of jury confusion would justify the state and federal claim for trial. In the case at bar there is no doubt that in

Petitioners Rodriguez's counterclaim the state issues substantially predominated.

Finally, Rule 60(b) (4) authorizes relief from void judgments. Necessarily a motion under this part of the rule differs markedly from motions under the other clauses of Rule 60(b). **There is no question of discretion on the part of the court when a motion is under Rule 60(b) (4).** "Austin v. Smith, C.A.1962, 312 F.2d 337, 114 U.S.App.D.C. 97. Hicklin v. Edwards, C.A.8th, 1955, 226 F.2d 410. Marquete Corp. v. Priester, 234 F.Supp. 799. Shannon v. Norman Block, Inc. R. I. 1969, 256 A.2d 214, 218 citing Barron & Holtzoff (Wright ed.). Emery v. Emery, Wyo1965, 404 P.2d 745, 749, citing Barron & Holtzoff (Wright ed.)."

There is no time limit on an attack on a judgment as void. Please see: "Misco Leasing, Inc. v. Vaughn, C.A. 10th, 1971, 450 F.2d 257. Taft v. Donellan Jerome, Inc., C.A. 7th, 1969, 407 F.2d 807. Bookout v. Beck, C.A.9th, 1965, 354 F.2d 823. Austing v. Smith, C.a. 1962, 312 F.2d 337, 343, 114 U.S. App. D.C.978, citing Barron & Holtzoff (Wright ed.). U.S. v. Melichar, D.C.Wis.1972, 56 F. R.D. 49. Ruddies v. Auburn Spark Plug Co., D.C.N.Y. 1966, 261 F.Supp. 648, 658, citing Barron & Holtzoff (Wright ed.). State v. Romero, 1966, 415 P:2d 837, 840, 76 N.M. 449, citing Barron & Holtzoff (Wright ed.).

"Judgment was vacated **as void 30 years after entry** in Crosby v. Bradstreet Co., C.A.2d, 1963, 312 F.2d 483, certiorari denied 83 S.Ct. 1300, 373 U.S. 911, 10 L.Ed.2d 412." Emphasis added.

"Rule 60(b)(4), which deals with relief from void judgments, **has no real time limit.** Marquette Corp. v. Priester, , 234 F.Supp. 799, 802, citing Barron & Holtzoff (Wright ed.). In this case the judgment was held not to

be void, although relief was granted under Rule 60(b)(6)." Emphasis added.

"Delay of 22 years did not bar relief. U.S. v. Williams, D.C.Ark.1952, 109 F. Supp. 456.

A judgment is not void merely because it is erroneous. It is void only if the court that rendered it **lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law."** Please see:

"Although the absence of subject matter jurisdiction may make a judgment void, the **total want of jurisdiction** must be distinguished from an error in the exercise of jurisdiction." Lubben v. Selective Serv. Sys. Local Bd. No. 27, C. A.1st, 1972, 453 F.2d 645. Emphasis added.

The Honorable District Court should have exercised its retainment of jurisdiction to dismiss the counterclaim without prejudice, if it always had in mind, as it did, to dismiss the RCRA cause of action without prejudice.

D. The First Circuit Court of Appeals erred in determining that Petitioners challenged the Magistrate Judge's dismissal of their state law counterclaim solely on jurisdictional grounds and that they did not challenge the merits of the magistrate judges decision; and therefore, they would not address any of these merits arguments because they were not properly raised by Petitioners before the magistrate judge and that arguments made on appeal normally cannot be made for the first time in a reply brief.

It is a matter of fact that Petitioners did not bring that issue for the first time in the Reply brief because they actually brought it up in the Brief for Appellant. This issue was brought in pages number 11 and 12. Furthermore, it was argued and discussed extensively in that Brief for Appellant on pages 15 and 16. In the series of motions filed by Petitioners requesting the opinion and order of October 1, 2004 be vacated they submitted evidence that clearly show that the counterclaim was not time barred. Even in one of those motions Petitioners requested sanctions to be applied to Respondent for not disclosing two letters which clearly demonstrated that the statute of limitations was interrupted in the state action. One of the motions filed by Petitioners was the Motion requesting sanctions under Rule 11. Please see Motion for Sanctions, docket No. 267, Appendix Brief for Appelant pages 251-301. The Honorable District Court for the District of Puerto Rico denied such motion, did not take into consideration any of the new evidence submitted, granted all the Summary Judgment Motions filed by Respondent and denied the one filed by filed by

Petitioners. The fact that the issue was brought at first in the motions filed by petitioners in the District Court was thoroughly discussed and presented to the First Circuit Court of Appeals in the Reply Brief and in the Motion for Reconsideration To The Same Panel.; but, there is no doubt that the issue was first brought up in the District Court , then in the Brief for Appellant, then in the Reply Brief and finally in the Motion for Reconsideration to the same Panel; therefore, the decision of the First Circuit Court of Appeals to affirm the judgment of the District Court was based on the wrong assumptions. Please see Brief for Appellant, Reply Brief and Motion for Reconsideration. Nevertheless, it is a matter of fact that all the Motions for Summary Judgment filed by both parties were based exclusively under CERCLA' cause of action and the District Court due to this Supreme Court's decision of Cooper vs. Aviall Supra did not have jurisdiction to rule upon them, and it does not make any difference whether the attorney for Petitioners at the time did not answer the Motion for Summary Judgment for Counterclaim. None of the decisions were valid. Since They we dictated without jurisdiction.

The First Circuit's decision effectively limits this Court's decision in 86 S.Ct. at 1139, 383 U.S. at 726-727 by establishing that District Courts should not consider if state issues substantially predominate in a counterclaim and may dismiss them with prejudice not letting the resolution to State Courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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No. 05-1722
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ESSO STANDARD OIL COMPANY (Puerto Rico), a Puerto Rico Corporation,
Plaintiff, Appellee,

v.

CARLOS E. RODRIGUEZ-PEREZ; CARMEN ORTIZ-LOPEZ; CONJUGAL PARTNERSHIP RODRIGUEZ-ORTIZ,
Defendants, Third-Party Plaintiffs, Appellants,

CARLOS M. BELGODERE-PAMIES; JANET ROE; CONJUGAL PARTNERSHIP BELGODERE-ROE,
Defendants,

ESTATE OF PAGAN-PAGAN,
Third-Party Defendant, Appellee.

June 14, 2006, Decided

COUNSEL: Hector M. Alvarado-Tizol, for appellant.

David P. Freeman, with whom Alexandra Rivera-Saez and O'Neill & Borges were on brief, for appellees.

JUDGES: Before Lipez and Howard, Circuit Judges, and Bowman, * Senior Circuit Judge.

OPINION BY: LIPEZ

OPINION: LIPEZ, Circuit Judge. Esso Standard Oil Company brought suit under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and the Resource Conservation and Recovery Act ("RCRA") against Carlos Rodriguez-Perez, his wife Carmen Ortiz-Lopez, and their conjugal partnership; and Carlos M. Belgodere-Pamies, his wife Janet Roe, and their conjugal partnership (collectively, "Defendants"). The defendants filed state law counterclaims. The parties consented to proceed before a U.S. magistrate judge. On summary judgment, the magistrate judge dismissed those counterclaims with prejudice.

Subsequently, with Esso's claims still pending, the United States Supreme Court decided *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). There, the Court held that a CERCLA contribution claim, similar to the one asserted in this case by ESSO, was subject to certain statutory requirements. There is no dispute that Esso did not meet these requirements and, therefore, could not maintain its CERCLA claim against the defendants. The magistrate judge dismissed the CERCLA claim accordingly.

The defendants now challenge the magistrate judge's dismissal of their state law counterclaims, claiming that, in the aftermath of Cooper Industries, there was never subject matter jurisdiction over them. We affirm.

I.

A. Factual Background

Esso primarily sought two forms of relief: (1) contribution under § 113(f) of CERCLA, 42 U.S.C. § 9613(f); and (2) injunctive relief under § 7002(a)(1)(B) of the Solid Waste Disposal Act, as amended by RCRA, 42 U.S.C. § 6972, for the response costs that Esso incurred in remedying environmental contamination at a gasoline service station located in La Vega Ward, Barranquitas, Puerto Rico (the "Station"). Operated as a retail service station from the mid-1930's until August 1998 when it was closed, the Station sold gasoline, diesel fuel, automobile parts, and motor oil. The Station's operators performed oil changes, greasing operations, used battery recharging and replacement, mechanical work, and the washing of vehicles on the premises. In 1971, Rodriguez took over control of the Station's day-to-day operations from his father. In 1979, Rodriguez leased the station from Jose Domingo Pagan-Pagan. Rodriguez managed and controlled the Station from 1979 until its closure in August 1998.

There was significant disposal of hazardous substances on the premises during the Station's operation under Rodriguez's management. Motor oil drained from automobiles was allowed to flow into the Pinones River, a body of water located behind the station. Similarly, used oil filters were found buried in large quantities in the northern part of the Station. Gasoline and diesel used to flush dirt and grease from vehicles were rinsed onto the ground and into the river using a pressure hose. As a result, the premises became contaminated with a number of hazardous substances including lead, chromium, benzene, ethylbenzene, toluene, and xylene.

Belgodere began his involvement at the station in 1993. In 1994, he conducted reviews of soil conditions and

inventory records in connection with a prior civil action brought by Rodriguez against Esso. In 1995, Belgodere entered into a formal agreement with Rodriguez to act as the latter's environmental consultant and expert witness.

Under CERCLA, Esso sought contribution from Defendants for the cost of cleaning up the hazardous substances on the premises of the Station. Under RCRA, Esso sought an injunction ordering Defendants, among other things, "to investigate, abate and remediate any endangerment posed by the environmental conditions" at the Station.

B. Procedural Background

The proceedings, as they are relevant to this appeal, unfolded as follows:

-- After Esso filed its Second Amended Complaint, Defendants filed counterclaims grounded in state law claiming: (1) lost income; (2) lost future income; (3) lost gasoline; (4) slander; (5) attorney's fees; (6) mental anguish; and (7) injunctive relief.

-- Both parties moved for summary judgment on the issue of liability for contribution under CERCLA. Esso also moved for summary judgment on the state law counterclaims.

-- The magistrate judge issued an opinion and order on the pending summary judgment motions. The magistrate judge granted summary judgment in favor of Esso on Defendants' counterclaims, concluding that the state law counterclaims were time-barred. The

magistrate judge also ruled in favor of Esso on the CERCLA liability claim.

-- Defendants filed a motion for reconsideration, requesting the magistrate judge to reconsider his summary judgment decision.

-- While the reconsideration motion was pending, Esso submitted an informative motion advising the magistrate judge of the Supreme Court's decision in Cooper Industries. As a result of Cooper Industries, Esso could not maintain its contribution claim pursuant to § 113(f)(1) of CERCLA.

-- The magistrate judge denied Defendants' motion for reconsideration. The magistrate judge contemporaneously issued: (1) a partial final judgment dismissing Defendants' counterclaims with prejudice pursuant to Fed. R. Civ. P. 54(b) (which permits a district court to enter final judgments as to one or more but fewer than all claims in a case involving multiple claims and/or parties); and (2) an order requesting Esso to show cause as to the effect of Cooper Industries on its CERCLA claim.

-- In response to the magistrate judge's request to show cause, Esso moved for voluntary dismissal without prejudice of both its CERCLA and RCRA claims.

-- The magistrate judge entered an opinion and order dismissing Esso's CERCLA claim with prejudice, based on the Cooper Industries decision. The court also dismissed Esso's RCRA claim without prejudice.

-- Defendants filed a motion to vacate judgment under Fed. R. Civ. P. 60(b)(4) and 41(a)(2). Rule 60(b)(4) permits a district court to relieve a party from a final judgment, order, or proceeding if the judgement is void. Rule 41(a)(2) establishes a framework for district courts to enter voluntary dismissals.

-- Esso filed a motion to amend or alter judgment pursuant to Rule 59(e), requesting that the dismissal of its CERCLA claim be without prejudice. Esso argued that because its CERCLA claim was a contribution claim, the claim's dismissal should be without prejudice in order to avoid res judicata and allow Esso to renew the contribution claim on grounds other than § 113(f)(1) of CERCLA.

-- The magistrate judge issued a final order and opinion denying Defendants' motion to vacate judgment. The magistrate judge explained that while there never was subject matter jurisdiction over Esso's CERCLA claim, there was jurisdiction over the case at all times because of Esso's RCRA claim. n1 Therefore, it had supplemental jurisdiction over Defendants' state counterclaims when it ruled that those claims were time-barred.

-- In its final amended judgment, the magistrate judge, persuaded by the reasoning in Esso's motion to alter or amend judgment, dismissed without prejudice both Esso's CERCLA and RCRA claims. Previously, he had dismissed the CERCLA claim with prejudice.

C. Standard of Review

We review a district court's ultimate conclusion on the existence vel non of subject matter jurisdiction de novo because it is a question of law. *Skwira v. United States*, 344 F.3d 64, 72 (1st Cir. 2003) (citing *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 365 (1st Cir. 2001)). Review of a decision made pursuant to Rule 60(b)(4) is also de novo. *M & K Welding, Inc. v. Leasing Partners, LLC*, 386 F.3d 361, 365 (1st Cir. 2004) ("Although orders on some Rule 60(b) motions, such as those asserting mistake or excusable neglect under subsection (b)(1), ordinarily are reviewable only for abuse of discretion, a decision whether or not a judgment is void under 60(b)(4) allows no room for discretion. The review is de novo.").

II.

A. Cooper Industries

There is no dispute that Esso's CERCLA claim was not properly before the magistrate judge. In Cooper Industries, the Supreme Court clarified the circumstances under which a private party may seek contribution under § 113(f)(1) of CERCLA. Section 113(f)(1), pursuant to which Esso brought its contribution claim against Defendants, "allows persons who have undertaken efforts to clean up properties contaminated by hazardous substances to seek contribution from other parties liable under CERCLA." *Cooper Indus.*, 543 U.S. at 160. Section 113(f)(1) further specifies that a party may obtain contribution "during or following any civil action" under CERCLA § 106 or § 107(a).

The issue the Court decided was "whether a private

party who has not been sued under § 106 or § 107(a) [of CERCLA] may nevertheless obtain contribution under § 113(f)(1) from other liable parties." 543 U.S. at 160-61. The Court held that such a party may not. Id. at 161. Because, like the plaintiff in Cooper Industries, Esso had not been sued under § 106 or § 107(a) of CERCLA, it could not maintain its § 113(f)(1) CERCLA claim and the magistrate judge properly dismissed it.

B. Esso's RCRA claim

Defendants argue that Esso's RCRA claim, like its CERCLA claim, was not properly before the magistrate judge. As a result, because there was no pending question of federal law, there was no supplemental jurisdiction over Defendants' state law counterclaims, and they could not have been dismissed with prejudice. See 28 U.S.C. § 1367(a) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy under Article III."); *BIW Deceived v. Local S6, Indus. Union of Marine and Shipbuilding Workers of Am.*, 132 F.3d 824, 833 (1st Cir. 1997) ("A federal court that exercises federal question jurisdiction over a single claim may also assert supplemental jurisdiction over all state-law claims that arise from the same nucleus of operative facts.").

Defendants base their argument on 42 U.S.C. § 6972(b)(1)(B), which details one of the limitations on filing a citizen suit n2 pursuant to RCRA. It states that a citizen suit may not be commenced "if the Administrator or State has commenced and is diligently

prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order." However, the plain language of the statute undermines Defendants' position. While it is true that the Puerto Rico Environmental Quality Board is prosecuting an administrative case involving the Station, the statutory provision precludes a citizen suit under RCRA only if the suit is "a civil or criminal action in a court of the United States or a State." An administrative proceeding does not take place in a "court of the United States or a State." The RCRA claim was properly before the magistrate judge, and there was supplemental jurisdiction over the state law counterclaims.

C. Abstention

Defendants also assert that the magistrate judge should have abstained from hearing and determining their state law counterclaims. Defendants raised this argument for the first time on March 14, 2005 in a reply to an opposition to one of their motions for reconsideration. This demand for abstention came more than three-and-a-half years after Esso's RCRA claim was first filed in district court, and, more importantly, after Defendants had litigated the state law counterclaims on the merits, culminating in the magistrate judge's summary judgment ruling on those counterclaims. Defendants did not raise their abstention argument in a timely fashion, and we will not entertain it here. See *Marshall v. Marshall*, 126 S. Ct. 1735, 1746 n.3, 164 L. Ed. 2d 480 (2006) (upholding a bankruptcy court's decision to reject a motion for

mandatory abstention as untimely because the motion was filed eight months after adversary proceeding had begun).

D. The merits

In their appellate reply brief, Defendants invite us to review the merits of the magistrate judge's summary judgment decision on their state law counterclaims. Defendants contend that the magistrate judge was in error because their state law counterclaims were not time-barred. In the proceedings below, Defendants challenged the magistrate judge's dismissal of their state law counterclaims solely on jurisdictional grounds; they did not challenge the merits of the magistrate judge's decision. We do not address any of these merits arguments because they were not properly raised by Defendants before the magistrate judge. See *Boston Beer Co. Ltd. P'ship v. Slesar Bros. Brewing Co., Inc.*, 9 F.3d 175, 180 (1st Cir. 1993)("The law in this circuit is crystalline: a litigant's failure to explicitly raise an issue before the district court forecloses that party from raising the issue for the first time on appeal."). Additionally, arguments made on appeal normally cannot be made for the first time in a reply brief. *Aulson v. Blanchard*, 83 F.3d 1, 7 (1st Cir. 1996) ("[R]elief from an appellate court, requested for the first time in a reply brief, is ordinarily denied as a matter of course.").

E. Rule 41(a)(2)

Finally, Defendants contend that the magistrate judge could not dismiss the state law counterclaims with prejudice, while at the same time dismissing Esso's

CERCLA and RCRA claims without prejudice. Defendants base this argument on Fed. R. Civ. P. 41(a)(2). Rule 41(a)(2), which provides for voluntary dismissals, states in relevant part that:

[i]f a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

This language does not support Defendants' position. Esso did not move for voluntary dismissal of its CERCLA and RCRA claims until after the magistrate judge had granted partial summary judgment on Defendants' counterclaims. Because the state law counterclaims were no longer pending at the time of the magistrate judge's voluntary dismissal of Esso's federal claims, Rule 41(a)(2) does not apply.

Affirmed.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

* Of the Eighth Circuit, sitting by designation.

n1 We are not called upon to decide whether the CERCLA claim should have been dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), as the magistrate judge ruled, or for failure to state a claim under Rule 12(b)(6).

n2 A citizen suit is "[a]n action under a statute giving citizens the right to sue violators of the law . . . and to seek injunctive relief and penalties." Black's Law Dictionary, 8th ed. (2004). Typically, citizen suits, where they exist, function as a form of statutory enforcement in addition to, or in conjunction with, enforcement by an administrative agency or other governmental entity.

CIVIL 01-2012 (SEC) (JA)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ESSO STANDARD OIL COMPANY,
(PUERTO RICO),
Plaintiff

v.

CARLOS E. RODRIGUEZ PEREZ, et al.,
Defendants

January 20, 2005, Decided

COUNSEL: For Plaintiff or Petitioner: David P. Freedman, Alexandra Rivera-Saez, American International Plaza, San Juan, Puerto Rico, Julio Gomez, Keena Mackay, John McGahren, Alejandro Perez, Bruce Taterka, Newark, NJ

For Defendant or Respondent: Jose A. Hernandez-Mayoral, San Juan, PR; Juan H. Saavedra-Castro, San Juan, PR; Orlando Cabrera-Rodriguez, San Juan, PR; Rafael E. Garcia-Rodon, San Juan, PR

For Third Party Defendant: Jose D. Pagan-Pagan, Guavnabo, Puerto Rico

For Interested Party: Madelaine Riefkohl-Gorbea, San Juan, PR

For Pro Se Party: Carlos M. Belgodere-Parries, Urb. Monte Claro, Bayamon, PR

JUDGES: JUSTO ARENAS, Chief United States Magistrate Judge

OPINION BY: JUSTO ARENAS

OPINION:

OPINION AND ORDER

I. INTRODUCTION

There are several motions pending before the court. On August 2, 2004, plaintiff Esso Standard Oil Company (Puerto Rico) (hereinafter "Esso"), filed a motion to strike defendants' expert. (Docket No. 246.) Said motion stands unopposed as of this date. Also before the court are the motions for reconsideration and to alter or amend judgment filed on October 12, 2004 by co-defendants Carlos E. Rodriguez Perez (hereinafter "Rodriguez"), his wife Carmen Ortiz Lopez (hereinafter "Ortiz"), and the conjugal partnership formed by both (Docket Nos. 252, 253), requesting that the court reconsiders its opinion and order of October 4, 2004. (Docket No. 250.) n1 Esso opposed co-defendants' motions on October 19, and 26 respectively. (Docket Nos. 260, 261.) In addition, co-defendants Rodriguez and Ortiz filed replies to Esso's opposition. (Docket Nos. 264, 266.) However, Esso has moved to strike said submissions on the grounds that they were, among other things, filed in violation of the local rules of this court. (Docket No. 271.) As expected, the co-defendants opposed such motion to strike. (Docket No. 273.)

The court is also considering co-defendant Carlos Belgodere Parries' (hereinafter "Belgodere") motion

similarly requesting the court to reconsider its October 4, 2004 opinion and order. (Docket No. 262, October 26, 2004.) Esso duly opposed Belgodere's motion on November 10, 2004. (Docket No. 269.) Furthermore, co-defendants Rodriguez and Ortiz filed a motion requesting that sanctions be imposed against Esso. (Docket No. 267, November 11, 2004.) Esso's opposition to the motion for sanctions and co-defendants' reply appear in the record at Docket Nos. 272 and 275.

I will consider each motion in the order outlined above, but first some background is in order.

II. PROCEDURAL BACKGROUND

Esso brought the present action against co-defendants Rodriguez, Ortiz and Belgodere under the Comprehensive Environmental Response Compensation and Liability Act (hereinafter "CERCLA"), *42 U.S.C. § 9601 et seq.* Esso sued the co-defendants, *inter alia*, under section 113(f) of CERCLA, *42 U.S.C. § 9613(f)*, seeking to recover part of the response costs that it has incurred in cleaning up the environmental contamination at a gasoline service station located in the La Vega Ward, Barranquitas, Puerto Rico. In due course, all parties moved for summary judgment on the issue of liability for contribution. (See Docket Nos. 228, 235, 236.) Esso also moved for summary judgment with respect to the claims asserted in the counterclaim filed by co-defendants Rodriguez and Ortiz. (Docket No. 229.)

On October 4, 2004, I issued an opinion and order disposing of the parties' requests for summary judgment. (Docket No. 250.) I granted Esso's motion for partial summary judgment on the issue of liability for contribution under CERCLA. Accordingly, I denied

co-defendants' motions for summary judgment on the same issue. (Id.) I also granted Esso's unopposed motion with respect to co-defendants' counterclaim. (Id.)

III. DISCUSSION

A. Esso's Motion to Strike Co-defendants' Expert

Esso moves the court to strike the expert report submitted by co-defendants Rodriguez and Ortiz' expert witness, Professor Juan Antonio Davila Garcia (hereinafter "Davila"). Esso also requests an order precluding the testimony of said witness at trial. According to Esso, the co-defendants have failed to comply with the requirements of *Federal Rule of Civil Procedure 26(a)(2)(B)* inasmuch as they have failed to submit, along with Mr. Davila's report, his qualifications or his curriculum vitae; a list of publications authored by the expert within the preceding 10 years; the compensation to be paid for his study and testimony; and a list of other cases in which the proposed expert has testified either at trial or by deposition within the preceding four years.

In addition, Esso adduces that it attempted to depose co-defendants' expert on June 21, 2004. However, the deposition had to be adjourned because the witness insisted in charging a fee that was more than three times higher than his customary fee. In fact, the witness requested to be paid $ 1,100 per hour. (Docket No. 246, Ex. 2, at 7-8.) He also demanded that he be paid for three hours in advanced. (Id. at 7.) But the record demonstrates that his customary fee is between $ 200 and $ 375. (Id.) After negotiations and this court's intervention in trying to resolve the issue, the parties were unable to agree on a reasonable fee.

Mr. Davila would not accept less that $ 850 per hour. (Id. at 25.)

Rule 26 of the Federal Rules of Civil Procedure provides in pertinent part that the expert disclosures must include "the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." *Fed. R. Civ. P. 26(a)(2)(B).* The First Circuit has interpreted these directives to be mandatory since the adoption of *Federal Rule of Civil Procedure 37(c)(1)*, which in turn'"contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule.'" *Poulis-Minott v. Smith, 388 F.3d 354, 358 (1st Cir. 2004)* (quoting *Klonoski v. Mahlab, 156 F.3d 255, 269 (1st Cir. 1998)).* In the ordinary case, the mandatory sanction is preclusion of the proffered testimony. *Klonoski v. Mahlab, 156 F.3d at 256*; see also *Fed. R. Civ. P. 37(c)(1)* (stating that "[a] party that without substantial justification fails to disclose information required by *Rule 26(a)* ... is not, unless such failure is harmless, permitted to use as evidence ... any witness or information not so disclosed.").

In this case, absent co-defendants' opposition to Esso's motion to strike, the court is presented with only one side of the story. Nevertheless, that is an adverse situation of co-defendants' own making. Given the failure to comply with the requirements of *Federal Rules of Civil Procedure 26(a)(2)(B)*, and because of the witness' attempt to extort from the plaintiff an exorbitant amount in exchange for his testimony at the

deposition, Esso's motion to strike Mr. Davila's expert report is GRANTED. Additionally, the co-defendants are precluded from calling Mr. Davila to testify as their expert at trial. No costs or attorney's fees are awarded.

B. Co-defendants' Motions for Reconsideration

All co-defendants filed motions requesting the court to reconsider the rulings made in the October 4, 2004, opinion and order. Co-defendants Rodriguez and Ortiz move the court to reconsider arguing, *inter alia*, that (1) te court did not have in front of it sufficient evidence to support the entry of summary judgment in favor of Esso; (2) the opinion and order was written in part relying on false evidence submitted by Esso; (3) the court erred in determining that the co-defendants had waived the affirmative defense of *res judicata;* and (4) this is a very complicated case where the public interest is involved and should not be resolved at the summary judgment stage.

Belgodere, on the other hand, maintains that the court should reconsider the entry of summary judgment because the evidence in the record demonstrated that he was not an operator of the station as defined by CERCLA. It is also Belgodere's position that the court did not take into consideration the opinion of Magistrate Judge Gustavo Gelpi in civil case No. 03-1485 where he held that CERCLA did not preempt state law, thus entitling him to statutory immunity under *12 P.R. Laws Ann. § 1291.* Finally, Belgodere claims that the court should reconsider its decision because this case is not a CERCLA case inasmuch as the petroleum exclusion applies.

Motions for reconsideration are governed by *Federal Rule of Civil Procedure 59(e).* It has been held

that "*Rule 59(e)* motions are 'aimed at reconsideration, not initial consideration.'" *FDIC v. World Univ., Inc., 978 F.2d 10, 16 (1st Cir. 1992)* (quoting *Harley-Davidson Motor Co., Inc. v. Bank of New England, 897 F.2d 611, 616 (1st Cir. 1990)).* The motion under *Rule 59(e)* must direct the court's attention to a manifest error of law or fact or present newly discovered evidence; it cannot present a new legal theory or evidence which was available but not presented. See *Landrau-Romero v. Banco Popular de P.R., 212 F.3d 607, 612 (1st Cir. 2000)*; see also *Aybar v. Crispin-Reyes, 118 F.3d 10, 16 (1st Cir. 1997)* ("The rule ... does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment."). Simply put, a motion for reconsideration is not an opportunity to present new legal claims or to re-litigate issues already decided at the summary judgment stage.

I. Rodriguez and Ortiz

Most of the arguments presented in co-defendants Rodriguez and Ortiz' motion for reconsideration can be disposed of fairly quickly for their lack of merit. First, co-defendants' contention that the court had insufficient evidence before it to support the entry of summary judgment is incorrect. The court considered all the evidence that appeared in the record and found that as a matter of law, the co-defendants were liable to Esso for contribution under CERCLA. Co-defendants Rodriguez and Ortiz presented a motion for summary judgment of their own but submitted no evidence whatsoever in support of the same. Additionally, the co-defendants failed to file an appropriate opposition to Esso's motion for summary judgment in accordance with *Federal Rule of Civil Procedure 56* and the local

rules of this court. n2 In doing so, the co-defendants cannot seriously claim that the court had no sufficient evidence before it to decide the motion for summary judgment when such a circumstance responds to their own failure to submit evidence to controvert Esso's position. The co-defendants did submit a statement of undisputed facts. (Docket No. 233.) But the same made no reference to evidence in the record, nor was it accompanied by any exhibits or documents. Furthermore, the required opposition to Esso's motion for partial summary judgment was never filed by the co-defendants. Consequently, their argument that the court's decision on summary judgment is without evidentiary support fails on the face of their own procedural failures. *Aybar v. Crispin-Reyes, 118 F.3d at 16* (quoting *Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996))* (*Rule 59(e)* "does not provide a vehicle for a party to undo its own procedural failures").

The same rationale applies to the claim that the court decided Esso's motion for summary judgment on the counterclaim filed by the co-defendants, misled by Esso's submission of false evidence. The co-defendants argue that the court's conclusion on the issue of statute of limitations was based on the submission by Esso of false evidence inasmuch as Esso never informed the court that the co-defendants had timely asserted their claims when they answered a complaint that was filed in state court by the Estate of Pagan-Pagan. They further maintain that in the state action, they asserted a third-party complaint against Esso for the controversy arising out of the closing of the station. Assuming for purposes of this discussion that the interposition of the third-party claim against Esso in 1999 interrupted the running of the statute of

limitations, there is no explanation in the record or in co-defendants' motions for reconsideration as to why they simply chose not to oppose Esso's motion for summary judgment so as to justify, disturbing my original determination. n3 Neither do I find merit in co-defendants' allegation that Esso submitted false evidence. Co-defendants' failure to demonstrate the existence of a factual dispute is also precluding them to use *Rule 59(e)* as a vehicle to bring arguments and evidence that were available and should have been brought at the summary judgment stage.

The co-defendants also contend that this case should not have been decided at the summary judgment stage because of the complexity of the case and the public interest implicated. While it may be true that the case involves complex issues and that there are public interest implications, that does not mean that the court cannot summarily dispose of the same, specifically where, as here, there were no genuine issues as to any material fact, and judgment was appropriate as a matter of law.

Next, I address co-defendants' contention that the court erred in ruling that they had waived their *res judicata* affirmative defense. First, I need to point out that the co-defendants misunderstood the nature of my ruling. I did not hold that they had waived the defense. The actual language of my order is:

> Specifically, these co-defendants maintain that the present action is barred by: the applicable statute of limitations; *res judicata;* waiver; and the equitable doctrine of laches. Finding that the grounds argued either have no merit, have already been

> decided or are asserted in a perfunctory manner, I find it unnecessary to address them in a lengthy discussion.

(Docket No. 250, at 30.)

The word waiver appears next to the term *res judicata* but not as an indication that the court considered the issue waived. The court was simply enumerating the additional grounds raised by the co-defendants in support of their motion for summary judgment. The ruling is in the subsequent sentence where I found that said additional grounds either had no merit, had already been decided or were asserted in a perfunctory manner. The affirmative defense of *res judicata* was indeed argued in a perfunctory manner in co-defendants' defendants' motion for summary judgment and that is the reason the court did not address said defense in depth.

The co-defendants limited themselves to argue in their motion for summary judgment that Esso *waived* its CERCLA contribution claim because it "failed to allege CERCLA when it was sued in local court in 1992 or during the administrative procedures [sic]." (Co-defendants' Motion for Summary Judgment, Docket No. 235, at 24.) In addition to the above, and after engaging in a treatise-like discussion of the *res judicata* concept, the co-defendants stated the following:

> The present case is similar to the case in Bayamon; it deals with releases gasoline from underground storage tank of La Vega Service Station. Plaintiff had to bring a counter claim alleging CERCLA and did not, waiving all rights to recover any cost.

> Furthermore, the Appellate Court of Puerto Rico made ESSO responsible for the spill at the La Vega Station and ordered the Superior Court to determine the amount lost.
>
> In the EQB, plaintiff was afforded due process by the agency. Plaintiff ESSO has not alleges [sic] CERCLA in the administrative proceedings and has waived any recovery from any other responsible party.

(Docket No. 235, at 28-29.) However, they presented no evidence and no argument whatsoever as to put the court in a position to determine that all the elements of the *res judicata* defense had been met in this case. The co-defendants attempted to argue, tersely, that since Esso did not bring its CERCLA contribution claim either at the 1992 lawsuit or at the administrative proceedings at the EQB, that *res judicata* barred the present action. Such an argument cannot be said to be sufficient to establish a movant's burden on summary judgment. It is well-settled that

> issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived... It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work... Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.

King v. Town of Hanover, 116 F.3d 965, 970 (1st Cir. 1997) (quoting *Willhauck, 953 F.2d 689, 700 (1st Cir. 1991)).*

Alternatively, in addition to co-defendants' deficient presentation of their arguments regarding the *res judicata* defense, a review of the evidence and the arguments presented for the first time reveals that it is questionable at best that the defense would preclude Esso's CERCLA claim. One of the central requirements of the defense is the existence of a final judgment on the merits. *Breneman v. United States ex rel. FAA, 381 F.3d 33, 38 (1st Cir. 2004)* (quoting *Apparel Art Int'l, Inc. v. Amertex Enters. Ltd., 48 F.3d 576, 583 (Pt Cir. 1995))* ("[A] final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action."). Here, the co-defendants rely on the "Order to Do and To Show Cause" issued by the Environmental Quality Board against Esso (Docket No. 265, Ex. 1) and the judgment of the Puerto Rico Court of Appeals issued on March 18, 2003. (Docket No. 253, Ex 3.) Their reliance is, however, misplaced. First, the "Order to Do and Show Cause" is merely the document by which the agency initiated the administrative process against Esso. As the court is well aware, said administrative process has not concluded, see *Esso Standard Oil, Co. v. Mujica-Cotto, 327 F. Supp. 2d 110 (D.P.R. 2004)*, aff'd, *389 F.3d 212 (1st Cir. 2004)*; hence, the order cannot constitute *res judicata.* Second, a reading of the Puerto Rico Court of Appeals judgment reveals that it is not a final judgment on the merits. The appellate court in that case reversed the lower court's decision to dismiss co-defendant's complaint pursuant to Rule 39(c)(2) of the Puerto Rico

Rules of Civil Procedure, 32 P.R. Laws Ann. App. II. (Docket No. 253, Ex. 3, at 26.) The court reversed the judgment of the lower court, declared the nullity of a hold harmless clause at issue in the case, and remanded to the lower court for the continuation of proceedings in accordance with the opinion stated therein. (Id.) At this time, the court is not aware of any final and firm judgment entered subsequent to the order of remand from which the co-defendants may assert the defense of *res judicata.* Therefore, in view of the above, co-defendants Rodriguez and Ortiz' motion for reconsideration and to correct or amend judgment is DENIED. n4

Finally, in their opposition to co-defendants' motion for reconsideration, Esso moves the court to enter partial judgment dismissing co-defendants counterclaim. Having granted Esso's motion for summary judgment regarding the counterclaim filed by the co-defendants, it follows that the counterclaim must be dismissed in its entirety. Consequently, there being no just cause for delay, the court will accordingly enter partial judgment pursuant to *Federal Rule of Civil Procedure 54(b).*

2. Belgodere

Belgodere's motion for reconsideration must similarly be denied. In it, Belgodere seeks to re-litigate and re-argue arguments already presented to and resolved by the court in the October 4, 2004, opinion and order. The only contention that the court will discuss is Belgodere's claim that there is a triable issue regarding statutory immunity under *12 P.R. Laws Ann. § 1291.* Because the issue was raised in Belgodere's opposition to Esso's motion for partial

summary judgment and because it was not addressed by me in the October 4, 2004, opinion and order, it is the only issue that qualifies for review on reconsideration as a possible manifest error of law.

This is not the first time that Belgodere has argued that he is immune from CERCLA liability by virtue of *12 P.R. Laws Ann. § 1291.* In his original motion to dismiss/summary judgment (Docket No. 105), Belgodere asserted that he was entitled to immunity under Law 94 of November 29. He provided neither a citation for the statute nor the year in which the law was passed. Based on such failure, I denied Belgodere's motion for summary judgment on that issue. (Docket No. 170 at 15.)

Subsequently, in a related action, Civil No. 03-1485, Carmen Marrero-Hernandez brought suit against Esso pursuant to section 505 of the Clean Water Act, as amended, *33 U.S.C. § 1365*, and section 7002 of the Solid Waste Disposal Act, as amended, *42 U.S.C. § 6972*, arising out of the same occurrence at issue here. Esso filed a third-party complaint against herein co-defendants Rodriguez and Belgodere under article 1802 of the Puerto Rico Civil Code seeking contribution and indemnification against them in the event that Esso is found liable in the principal action. In due course, Belgodere moved for dismissal/summary judgment claiming statutory immunity under *12 P.R. Laws. Ann. § 1291.* In an opinion and order issued on June 17, 2004, Magistrate Judge Gelpi denied Belgodere's motion for summary judgment. *Marrero Hernandez v. Esso Std. Oil Co., 321 F. Supp. 2d 301, 308 (D.P.R. 2004).* Magistrate Judge Gelpi found that Belgodere could invoke the Puerto Rico immunity statute because the same was not preempted by CERCLA. *Id. at 304-05.*

However, summary judgment was denied because there was a genuine issue of material fact as to whether Belgodere qualified for immunity under the statute. *Id. at 308.* Belgodere relies on Magistrate Judge Gelpi's opinion and order to claim statutory immunity under *12 P.R. Laws Ann. § 1291.*

Esso has argued that the limited immunity provision found in *section 1291* is inapplicable to this action inasmuch as state-law cannot provide the rule for determining liability under CERCLA. (Docket No. 244.) In other words, it is Esso's position that by enacting CERCLA, Congress provided a federal rule of decision in questions of liability that cannot be altered by application of a state statute or standard. Additionally, Esso contends that since *section 119 of CERCLA* includes a provision by which a response action contractor may obtain immunity, any Puerto Rico statute purporting to confer immunity on similar terms is preempted by CERCLA.

Section 1291 of Title 12, Puerto Rico Laws Annotated, provides:

> (a) The provisions of any other law notwithstanding, no person or intervening party shall be liable for the cleaning, removal or disposal expenses or for the damages caused by actions or omissions while remedying or trying to remedy or eliminate an oil or hazardous substances spill or while providing or rendering attention, help, assistance, or counsel following the National Contingency Plan or answering to the instructions and orders of

> the Federal On-Scene Coordinator or the designated Commonwealth official.
> (b) The aforementioned immunity shall not apply to:
> (1) the parties liable for the spill as defined in *§ 1290(h)* of this title;
> (2) incidents causing personal damages or death;
> (3) incidents where negligence or actions contrary to law are shown.
> (c) The liable party shall answer for the cleaning, removal or disposal expenses as well as for the damages caused by any other person relieved from responsibility under this section.
> (d) This chapter does not exempt from the liability any responsible party may have for any kind of oil or hazardous substances spill.

12 P.R. Laws Ann. § 1291.

Without extensive discussion, Magistrate Judge Gelpi concluded that Belgodere could rely on this statute because CERCLA itself explicitly states (*42 U.S.C. § 9652(d)*) n5 that it does not preempt state-law as to issues of liability. *Marrero Hernandez v. Esso Standard Oil Co., 321 F. Supp. 2d at 304-05.* Specifically, the magistrate judge held that *12 P.R. Laws Ann. § 1291* applied and that the court will not look to *42 U.S.C. § 9607* for questions concerning liability. Id.

It is not at all clear why Magistrate Judge Gelpi concluded under CERCLA that the court would only look to state law concerning issues of liability. First, the action under the court's consideration was brought

pursuant to the *Clean Water Act* and the Waste Disposal Act, not CERCLA. Therefore, the determination is dictum and is not binding on this court. See *Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992)* (holding that although relevant, observations not essential to the determination of the legal questions before the court are dicta). Second, if pursuant to *42 U.S.C. § 9652(d)*, courts could only look at state law for questions concerning liability, CERCLA's purpose would be frustrated, rendering useless the liability standard of *42 U.S.C. § 9607*. In any event, the issue before the court is whether the state immunity statute can be invoked to preclude as a matter of law the imposition of CERCLA contribution liability. I find that it cannot.

CERCLA does not completely preempt the field of compensation and recovery for injuries caused by the release and disposal of hazardous substances. In addition to *section 9652* discussed above, CERCLA also provides that "nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." *42 U.S.C. § 9614(a)*. In *United States v. Colorado, 990 F.2d 1565, 1575 (10th Cir. 1993)*, for instance, the court stated that "Congress clearly expressed its intent that CERCLA should work in conjunction with other federal and state hazardous waste laws in order to solve this country's hazardous waste cleanup problem." Clearly, Congress did not intend to preempt the field of hazardous waste cleanup with the enactment of CERCLA. *New Mexico v. GE, 335 F. Supp. 2d 1185, 1224 (D.N.M. 2004)*. However, a state statute or regulation conflicting with the purpose

or enforcement of any CERCLA provision might find itself preempted. See *United States v. City & County of Denver, 100 F.3d 1509, 1512-13 (10th Cir. 1996)*; see also *Coastline Terminals of Conn., Inc. v. USX Corp., 156 F. Supp. 2d 203, 208 (D. Conn. 2001)*.

Conflict preemption exists when "'compliance with both federal and state regulations is a physical impossibility' [or when] the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987)* (citations and internal quotations omitted). As an example, at least two circuits have held that state, common law contribution, restitution and indemnification claims are preempted by *section 113(f)* of CERCLA. *Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998)*; *In re Matter of Reading Co., 115 F.3d 1111, 1117 (3d Cir. 1997)*; cf. *MSOF Corp. v. Exxon Corp., 295 F.3d 485, 490-91 (5th Cir. 2002)*. Similarly, a savings clause such as the one found in CERCLA cannot be said to allow state law to nullify the specific provisions of a federal Act. *PMC, Inc. v. Sherwin-Williams, Co., 151 F.3d 610, 618 (7th Cir. 1998)*.

Such a conclusion does not resolve the present controversy. The court must determine if the statutory limited immunity set forth in *12 P.R. Laws Ann. § 1291* is in actual conflict with any CERCLA provision so as to be preempted. As stated above,, *section 1291* provides limited immunity to a person under the particular circumstances described therein, i.e. "while remedying or trying to remedy or eliminate an oil or hazardous substances spill or while providing or rendering attention, help, assistance, or counsel

following the National Contingency Plan or answering to the instructions and orders of the Federal On-Scene Coordinator or the designated Commonwealth official." *12 P.R. Laws Ann. § 1291(a)*. In addition, the statute provides the factors under which such a person would not qualify for the immunity despite falling within the above-definition. But CERCLA itself has an immunity provision for response action contractors allowing the contractor to escape liability if the circumstances defined in the statute are met. *42 U.S.C. § 9619. Section 9619*, however, provides a standard that is different and that varies from the standard set forth in the local immunity statute. The standard for immunity under state law appears more lenient than the standard under CERCLA, thus creating a conflict. But the most significant conflict between the local statute and CERCLA is that concerning the imposition of liability and the exceptions to immunity in *section 1291*.

I assume for purposes of this discussion that *section 1291* indeed applies to the present action, and as Magistrate Judge Gelpi observed in his opinion and order. To qualify for immunity under said section, Belgodere would have to meet at least one of the criteria of *section 1291 (a)* and not fall within any of the exceptions to immunity set forth in *section 1291(b)*. Once again, assuming that Belgodere fits the mold of one of the *section 1291(a)* criteria, he still cannot fall within one of the exceptions of *section 1291(b)*. *Section 1291(b)* denies liability to an otherwise qualified person if (1) the person qualifies as a party liable for the spill as defined in *section 1290(h)* of this title; (2) the incident at issue caused personal damages or death; or (3) the incident is one where negligence or actions contrary to law are shown. *12 P.R. Laws Ann. § 1291(b)*.

Magistrate Judge Gelpi found that there was a genuine issue of material fact precluding summary judgment on exceptions (2) and (3). *Marrero Hernandez v. Esso Standard Oil Co., 321 F. Supp. 2d at 307-08.* As to exception (1), however, the magistrate judge found that Belgodere was not as a matter of law precluded from immunity. *Id. at 307.* In other words, he found that Belgodere is not a party liable for the spill as defined by *12 P.R. Laws Ann. § 1290(h).* The reason is that *section 1290(h)* defines responsible party as one who "owns and operates a facility." *12 P.R. Laws Ann. § 1290(h)(2)* (emphasis added). Magistrate Judge Gelpi concluded that even if Belgodere meets the definition of an operator, he is not an owner of the station and therefore, not a responsible party. Id. The problem with the statute lies in such a construction.

Liability under *sections 107* or *113(f)* of CERCLA can be imposed on either a current or past owner or operator of a facility. *42 U.S.C. § 9607(a)* (emphasis added); see also *Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150-51 (1St* Cir. 1989). Unlike *section 1290(h)(2)*, there is no requirement that the person be both an owner and an operator. In my opinion and order, I found that Belgodere qualified as an operator of the station under the United States Supreme Court definition, *United States v. Bestfoods, 524 U.S. 51, 66-67, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998)*; therefore, he was a person liable or potentially liable for the release of hazardous substances, from which Esso could seek contribution. See *42 U.S.C. § 9613(f)(1).* Based on such finding, Belgodere would also fall within exception (1) of *section 1291(b)* but for the requirement in *section 1290(h)(2)* that he be both an owner and an operator. Such conflict

between CERCLA and the state immunity statute cannot be reconciled in light of CERCLA's purpose and spirit. Consequently, the state law immunity set forth in *section 1291* stands as an obstacle to the full accomplishment of the purposes and objectives of CERCLA and is, therefore, preempted.

In view of the above, the denial of Belgodere's motion for summary judgment on the issue of CERCLA liability and the granting of Esso's motion for partial summary judgment was not a manifest error of law mandating that my October 4, 2004 opinion and order be disturbed. Belgodere's motion for reconsideration is DENIED.

C. Rodriguez and Ortiz' Motion for Sanctions

Co-defendants Rodriguez and Ortiz filed a motion on November 11, 2004, requesting that sanctions be imposed on Esso pursuant to *Rule 11 of the Federal Rules of Civil Procedure.* (Docket No. 267.) Co-defendants' specific allegation is that Esso included misleading statements in its opposition to co-defendants' motion for reconsideration with the sole purpose of inducing this court to error and in clear violation, of *Rule 11.* On November 22, 2004, Esso submitted its opposition to co-defendants' motion for sanctions. (Docket No. 272.) In it, Esso argues that co-defendants' motion under *Rule 11* should be denied as a threshold matter for their failure to comply with a number of procedural requirements. Esso maintains, *inter alia,* that the motion for sanctions was not served previously as mandated by *Rule 11*; that the co-defendants did not seek leave from the court to submit a motion that exceeds the page limit set forth in Rule 7 of the local rules of this court; and that the request for

sanctions should be stricken from the record pursuant to *Federal Rule of Civil Procedure 12(f)*. In reply, the co-defendants defend against Esso's contention claiming that Esso is using "legal technicalities" to divert the court's attention from the real issue, the *Rule 11* violation. (Docket No. 275.)

Rule 11 provides in relevant part that a party or attorney may be sanctioned by the court on its own initiative or by motion of a party if the claims or arguments presented are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" or if there is no evidentiary support for the facts alleged or denied. *Fed. R. Civ. P. 11(b)-(c); Protective Life Ins. Co. v. Dignity Viatical Settlement Partners. L.P., 171 F.3d 52, 56 n.2 (1st Cir. 1999). Rule 11* has a "safe harbor" provision requiring a movant to serve the motion on the opposing counsel or party and then wait 21 days after service before filing the motion for sanctions with the court. *Fed. R. Civ. P. 11(c)(1)(A)*. The purpose of this provision is to allow an attorney to correct his or her error before the opposing party or counsel initiates *Rule 11* proceedings. *Nyer v. Winterthur Int'l, 290 F.3d 456, 460 (1st Cir. 2002).*

Evidently, the co-defendants failed to comply with the safe harbor provision of *Rule 11*. They admit as much when they characterize the requirement of *Federal Rule of Civil Procedure 11(c)(1)(A)* as a "legal technicality" that does not require denial of the motion for sanctions. Throughout this litigation, the co-defendants have exhibited a complete disregard for procedural rules and the local rules of this court. Procedural rules are not, as the co-defendants would have the court hold, mere technicalities. They exist for

a reason and are not to be followed only at the option, convenience or whimsy of litigants. Co-defendants' failure to comply with the safe harbor provision alone justifies denial of the motion for sanctions. See *Waters v. Walt Disney World Co., 237 F. Supp. 2d 162, 167-68 (D.R.I. 2002); Martins v. Charles Goodwin Inn. Sch., 178 F.R.D. 4, 7(D. Mass. 1997).*

In addition, co-defendants' motion for sanctions does not comply with the requirements of Rule 7 of the Local Rules of this district which requires that a non-dispositive motion not exceed 15 pages in length unless otherwise authorized by the court. See Local Rule 7.1(e). Co-defendants' motion for sanctions is 29-pages long and no leave from the court was obtained for such filing in excess of the total pages allowed. This is yet another example of co-defendants disregard for procedural rules. Therefore, co-defendants' motion for sanctions is DENIED.

IV. CONCLUSION

In view of the above, Esso's motion to strike co-defendants Rodriguez and Ortiz' proposed expert is GRANTED. The motions for reconsideration of my October 4, 2004 opinion and order are all DENIED. Co-defendants' motion for sanctions is also DENIED.

SO ORDERED.

At San Juan, Puerto Rico, this 20th day of January, 2005.

JUSTO ARENAS

Chief United States Magistrate Judge

Footnotes

n1 On this same date I issued an order to show cause directed at Esso regarding its claims in light of the United States Supreme Court recent decision in *Cooper Indus., Inc. v. Aviall Servs., Inc., 160 L. Ed. 2d 548, 125 S. Ct. 577 (2004)* (holding that a private party who has not been sued under *sections 106* or *107* of CERCLA, cannot obtain contribution from other liable parties under *section 113(f)*). I will issue a ruling regarding the effects, if any, of Aviall Servs. over the claims asserted in this case once the issue has been briefed. However, I find it unnecessary to defer ruling on the motions for reconsideration that are now before the court since the issues presented are not those covered by the Supreme Court decision. In other words, the co-defendants. have not sought reconsideration of my findings regarding the specific question addressed by the Court in Aviall Servs., which I discussed in the previous opinion and order (Docket No. 250), following the case law as it existed at the time. See *Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677 (5th Cir. 2002).*

n2 Specifically, Local Rule 56(b) requires a motion for summary judgment to be accompanied by a separate, short and concise statement of material facts that supports the moving party's claim that there are no genuine issues of material fact in dispute. These facts are then deemed admitted until the nonmoving party provides a similarly separate, short and concise statement of material fact establishing that there is a genuine issue in dispute. See Local Rule 56(e) (2004); *Morales v. A.C. Orssleff's EFTF, 246 F.3d 32, 33 (1st Cir. 2001)*; *Ruiz Rivera v. Riley, 209 F.3d 24, 26 (1st Cir. 2000)*; *Dominguez v. Eli Lilly & Co., 958 F. Supp. 721, 727(D.P.R. 1997).*

n3 I reviewed the answer to the complaint in the state eviction case and it appears that the third-party complaint against Esso was filed on September 24, 1999, that is more than one year after August 1, 1998, the actual date the station was closed and thus the latest possible time during which co-defendants' loss of income cause of action could have accrued.

n4 Esso has also moved to strike co-defendants' replies (Docket Nos. 264, 266) on the grounds that said submissions were filed in violation of Local Rule 7(c) and (e). (Motion to Strike, Docket No. 271.) The replies were indeed belatedly filed without first obtaining leave from the court and the reply memorandum at Docket No. 266 is 26-pages long in violation of Local Rule 7(c). As such, Esso's motion to strike (Docket No. 271) is GRANTED. The replies were not considered.

n5 *Section 9652 of CERCLA* provides in relevant part that

> (d) Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.

42 U.S.C. § 9652(d).

CIVIL 01-2012 (SEC) (JA)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ESSO STANDARD OIL COMPANY,
(PUERTO RICO),
Plaintiff

v.

CARLOS E. RODRIGUEZ PEREZ, et al.,
Defendants

October 1, 2004, Decided

COUNSEL: For Plaintiff or Petitioner: DAVID P. FREEDMAN, American International Plaza, San Juan, Puerto Rico; JULIO GOMEZ; KEENA MacKAY; JOHN McGAHREN; ALEJANDRO PEREZ; BRUCE TATERKA, One Newark Center, Newark, NJ

For Defendant or Respondent: JULIO GIL-DE-LA-MADRID, Reparto Alhambra, Bayamon, Puerto Rico

For Third Party Defendant: JOSE D. PAGAN-PAGAN, Guaynabo, Puerto Rico

JUDGES: JUSTO ARENAS, Chief United States Magistrate Judge

OPINION BY: JUSTO ARENAS

OPINION:

OPINION AND ORDER

There are several motions for summary judgment pending before the court in this CERCLA n1 action. On June 28, 2004, plaintiff Esso Standard Oil Company (Puerto Rico) (hereinafter "Esso") filed a motion for partial summary judgment with respect to the issue of defendants' liability under CERCLA. (Docket No. 228.) Esso also moved for summary judgment on the counterclaim filed by co-defendants Carlos Rodriguez Perez (hereinafter "Rodriguez"), Carmen Ortiz Lopez (hereinafter "Ortiz") and the conjugal partnership formed by them. (Docket No. 229.) On the same date, co-defendant Carlos M. Belgodere-Parries (hereinafter "Belgodere") cross-moved for summary disposition on the issue of CERCLA liability. (Docket No. 236.) Co-defendants Rodriguez and Ortiz filed their own motion for summary judgment on June 30, 2004. (Docket No. 235.)

On July 19, 2004, Esso filed its response in opposition to the summary judgment motions submitted by the co-defendants. (Docket No. 240.) On July 20, 2004, Belgodere submitted a response in opposition to Esso's partial summary judgment motion. (Docket No. 242.) Esso replied to Belgodere's opposition on July 30, 2004. (Docket No. 244.) Esso's motions remain unopposed by Rodriguez and Ortiz.

After considering the arguments of the parties, the evidence in the record and for the following reasons, Esso's motion for partial summary judgment is GRANTED. Esso's motion for summary judgment on the counterclaim is also GRANTED. Belgodere's cross-motion for summary judgment is DENIED. Rodriguez

and Ortiz' motion for summary judgment is also DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

Esso brings the present action against the defendants seeking contribution under *section 113(f) of CERCLA* for the response costs that Esso has incurred in cleaning up the environmental contamination at a gasoline service station located in the La Vega ward, Barranquitas, Puerto Rico (hereinafter "the station"). The station has operated as a retail service station since the mid 1930's until 1998 when it was ordered closed. It sold gasoline, diesel fuel, automobile parts and motor oil. Oil changes, greasing operations, used battery recharging and replacement, mechanical work and the washing of vehicles with diesel fuel are among the services the station provided. Rodriguez began managing the station in 1971 when he assumed from his father the control over the station's day-to-day operations. In 1979, Rodriguez leased the station from Jose Domingo Pagan Pagan. Rodriguez managed and controlled the station until August of 1998.

It is alleged that during this time, there was a significant disposal of hazardous substances at the station. Specifically, it is asserted that motor oil drained from automobiles was allowed to flow into the Pinonas river, a body of water located behind the station. Similarly, used oil filters were found buried in large quantities in the northern part of the station. Gasoline and diesel used to flush dirt and grease from vehicles were sprayed off onto the ground and into the river using a pressure hose. As a result, the station premises became contaminated with hazardous substances

including lead, chromium, benzene, ethylbenzene, toluene and xylene. It is alleged by Esso that even after the station was closed, Rodriguez continued to control access to the premises, impeding Esso's remediation efforts.

Belgodere, on the other hand, began his involvement at the station in 1993. In 1994, Belgodere conducted cursory reviews of soil conditions and inventory records in connection with a civil action brought by Rodriguez against Esso. In 1995, Belgodere entered into a formal agreement with Rodriguez by which the former was to act as both environmental consultant and expert witness in the lawsuit filed by the latter. It is alleged that on March 10, 1997, Belgodere reported to the National Response Center the release of 80,000 gallons of gasoline at the station. However, a subsequent study estimated the actual amount of product release to be about 1,000 gallons. Officials from the Puerto Rico Environmental Quality Board (hereinafter "EQB") later suspected that gasoline had been dumped at the station to give support to the allegations in the on-going lawsuit.

On August 1, 1998, Belgodere engaged in what is described by Esso as a "reckless investigation" which he allegedly now claims was intended to determine that the station was not contaminated. As part of the investigation, Belgodere drilled five soil borings without EQB's approval, using a 16-inch diameter pole auger. Said pole auger, which is normally used to dig holes for telephone poles, was deemed wholly unacceptable for conducting soil borings by EQB officials. Other allegations with respect to Belgodere's investigation refer to the apparently improper instruction that the cuttings from the soil borings be

replaced in the holes instead of being containerized for proper disposal. Also, Belgodere ordered that the auger be steam-cleaned without ensuring that the cleaning process would not spread contaminated soil. It is further alleged that Belgodere drilled a hole in a basement wall which led to the escape of vapor emissions. According to Esso, he failed to seal this hole, creating a dangerous condition at the station, for which the same was ordered closed by the Fire Department.

On August 3, 1998, Belgodere stated that he was "in charge" of the station and denied Esso access to the property preventing the installation of explosion-proof blowers to disperse the vapor releases caused by Belgodere. Belgodere also denied Esso access to the station for a period running from September of 1998 to February of 2000. It is claimed that during this time, Esso's personnel sought to perform investigation and site remediation activities but were unable to do so because of Belgodere's denial of access. Belgodere allegedly intimidated and harassed Esso and EQB's personnel, obstructing with such conduct the response to the environmental situation at the station.

The principal contention by Esso is that the conduct of both Rodriguez and Belgodere has interfered with the remediation process and has resulted in delays requiring additional investigations. Said conduct has also allowed the continued migration of hazardous substances, increasing the cost of remediation by adding at least $ 4 million in costs that would not have otherwise been incurred. Esso has been forced to perform what is described as "the most extensive environmental investigation of a gasoline service station ever conducted." It seeks contribution from both co-defendants under CERCLA.

In its motion for partial summary judgment, Esso maintains that there is no genuine issue as to any material fact and that as a matter of law, it is entitled to judgment with respect to the issue of liability. Specifically, Esso argues that (1) Rodriguez and Belgodere both fall under the definition of "operators" set forth in *section 107(a) of CERCLA*; (2) that under the unusual circumstances of this case, the station was a "facility" in which a release of hazardous substances occurred; (3) that Esso has incurred in response costs for the clean-up of contamination at the station; and (4) that such costs were necessary and consistent with the National Contingency Plan (hereinafter "NCP").

Esso also moves for summary judgment with respect to the counterclaim filed by Rodriguez and Ortiz. Esso argues that the claims for lost profits and loss of future income are barred by the applicable statute of limitations; that the defamation cause of action is also time-barred or that it fails because these co-defendants cannot demonstrate damages arising out of any alleged defamatory statements; that the claim for mental anguish should be dismissed for lack of a causal connection between co-defendants' symptoms and Esso's alleged tortuous conduct; that the claim for attorney's fees cannot be maintained inasmuch as it has been determined that Esso did not act obstinately in bringing this CERCLA case; and that the claim for injunctive relief is moot because Esso is already complying with remediation at the site pursuant to EQB's administrative orders.

Beldodere's motion for summary judgment challenges the court's jurisdiction on the grounds that this case "does not meet the requirements established" by CERCLA. Belgodere contends, *inter alia*, that Esso

has no standing to seek contribution under CERCLA because it is not subject to a prior or pending action under *sections 106* or *107(a)* of CERCLA. In addition, Belgodere maintains that CERCLA specifically excludes petroleum from the definition of hazardous materials; therefore, as a matter of law, Esso's contribution claim is precluded.

In their motion for summary judgment, Rodriguez and Ortiz agree with Belgodere in his contention that this is not a CERCLA case because petroleum is excluded from the definition of hazardous substances. They also parrot Belgodere's argument that Esso cannot seek contribution under CERCLA given that Esso is not the subject of a prior or pending action under *sections 106* or *107(a)*. In addition, Rodriguez and Ortiz maintain that summary judgment is warranted as to them because Esso's claims are barred by the applicable statute of limitations. They particularly contend that Puerto Rico's one-year statute of limitation has clearly lapsed and that even if CERCLA applied, the action is time-barred under CERCLA's limitations period. The equitable doctrine of laches is similarly raised by these co-defendants as a limitation on Esso's action. Finally, it is argued that Esso has waived its right to seek CERCLA relief under *res judicata* principles. Rodriguez and Ortiz submit that Esso had to bring its CERCLA claims in the 1992 state-court action filed by Rodriguez.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. To succeed on a motion for summary judgment, the moving party must show that there is an absence of evidence to support the nonmoving party's position. *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Once the moving party has properly supported its motion, the burden shifts to the nonmoving party to set forth specific facts showing there is a genuine issue for trial and that a trier of fact could reasonably find in its favor. *Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)*. The party opposing summary judgment must produce "specific facts, in suitable evidentiary form," to counter the evidence presented by the movant. *Lopez-Carrasquillo v. Rubianes, 230 F.3d 409, 413 (1st Cir. 2000)* (quoting *Morris v. Government Dev. Bank, 27 F.3d 746, 748 (1st Cir. 1994)*). A party cannot discharge said burden by relying upon "conclusory allegations, improbable inferences, and unsupportable speculation." Id.; see also *Carroll v. Xerox Corp., 294 F.3d 231,236-37 (1st Cir. 2002)* (quoting *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1251 (1st Cir. 1996)*) ("'Neither conclusory allegations [nor] improbable inferences' are sufficient to defeat summary judgment.").

The court must view the facts in light most hospitable to the nonmoving party, drawing all reasonable inferences in that party's favor. *Patterson v. Patterson, 306 F.3d 1156, 1157 (1st Cir. 2002)*. A fact is considered material if it has the potential to affect the outcome of the case under applicable law. *Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993)*. The filing of cross-motions for summary

judgment do not alter the application of the above-outlined standard. Rather, the court must determine whether either party is entitled to judgment as a matter of law on facts that are not disputed. *Adria Int'l Group, Inc. v. Ferre Dev., Inc., 241 F.3d 103, 107 (1st Cir. 2001).* "The court must consider each motion separately, drawing inferences against each movant in turn." *Reich v. John Alden Life Ins. Co., 126 F.3d 1, 6 (1st Cir. 1997).*

III. DISCUSSION

A. Motion for Partial Summary Judgment: Liability Under CERCLA

The parties cross-move for partial summary judgment on the question of liability of the co-defendants for contribution. Esso claims that although this is an unusual case, there is no factual dispute as to its entitlement to judgment. Esso further maintains that it has satisfied all the elements for a claim of contribution under *section 113(f) of CERCLA.* In essence, Esso's position is that both Rodriguez and Belgodere were "operators" of the station which qualifies as a "facility" under CERCLA and in which there was a release of hazardous substances. As a result of the release or threatened release of hazardous substances, Esso had to incur in response costs that were necessary and consistent with the NCP. The co-defendants deny liability claiming that this case does not fit the CERCLA mold. Because all the parties move for summary judgment on the issue of liability, I address their arguments together in this section. But first, the historical background of CERCLA.

The Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C. § 9601 et*

seq., "sketches the contours of a strict liability regime." *Acushnet Co. v. Mohasco Corp., 191 F.3d 69, 74 (1st Cir. 1999).* It was enacted in part to promote the expeditious remediation at hazardous waste sites, adequate compensation to the public fisc and the imposition of accountability. *United States v. Davis, 261 F.3d 1, 26-27 (1st Cir. 2001).* Indeed, the essential purpose of CERCLA is to make "those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *John S. Boyd Co. v. Boston Gas Co., 992 F.2d 402, 405 (1st Cir. 1993)* (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).* CERCLA also provides the federal government with the means to prevent the spread of hazardous materials. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1340 (9th Cir. 1992).* Pursuant to *section 107,* when an innocent party, usually the government, brings an action for cost recovery, liability for the clean-up may be imposed on four categories of persons: (1) owner or operator n2 ; (2) past owner or operator; (3) transporter or (4) arranger ("generator"). *42 U.S.C. § 9607(a);* see also *United States v. Davis, 261 F.3d at 28-29* (citing *Acushnet Co. v. Mohasco Corp., 191 F.3d at 74).*

In 1986, Congress amended CERCLA with the enactment of the *Superfund Amendments and Reauthorizations Act* (hereinafter "SARA"), to create, *inter alia,* a "contribution action" by which a person liable for cleanup costs under *section 107* could seek contribution from other Potentially Responsible Parties (hereinafter "PRPs"). *United States v. Davis, 261 F.3d*

at 16; *42 U.S.C. § 9613(f)*. *Section 9613(f)* provides in relevant part:

> (f) Contribution
> (1) Contribution
> Any person may seek contribution from any other person who is liable or potentially liable under *section 9607(a)* of this title, during or following any civil action under *section 9606* of this title or under *section 9607(a)* of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under *section 9606* of this title or *section 9607* of this title.

42 U.S.C. § 9613(f)(1). The standard for contribution liability under *section 9613(f)* is the same as the standard for cost recovery liability under *section 9607*. *Acushnet Co. v. Mohasco Corp., 191 F.3d at 75*. In other words, a plaintiff seeking contribution under *section 9613(f)* must prove that (1) the defendant falls within one of the four categories of "covered persons" (current or past owners or operators, transporters or generators) set forth in *section 9607(a)*; (2) a release or threatened release of a hazardous substance occurred in defendant's facility; (3) plaintiff incurred in response costs because of the release or threatened release; and

(4) the costs were necessary costs of response in accordance with the NCP. *Acushnet Co. v. Mohasco Corp., 191 F.3d at 75* (citing *Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989)*). Before entering into whether Esso meets the requirements for a viable contribution claim, I need to address the jurisdictional issue raised by the co-defendants for it may render moot the remainder discussion.

1. Prior or Pending Civil Action

Belgodere, Rodriguez and Ortiz all contend that this is not a CERCLA case. They argue that Esso cannot seek contribution under *section 9613(f)* because there is no prior or pending civil action under *sections 106* or *107(a)* of CERCLA against Esso. They maintain that the existence of a prior or pending civil litigation under *sections 106* or *107* is a necessary element to provide a federal court with jurisdiction to entertain a CERCLA contribution claim. The co-defendants exclusively rely on the Fifth Circuit Court of Appeals' decision in *Aviall Servs. Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001)* (hereinafter "Aviall I").

Esso disagrees. Esso claims that co-defendants' position is untenable for three main reasons. First, Esso submits that the issue was already presented by and resolved against co-defendants when this court ruled upon Belgodere's motion to dismiss. (See Docket No. 170.) Consequently, the previous decision constitutes the law of the case, according to Esso, and the co-defendants have presented no extraordinary circumstances warranting this court's revisiting of the issue. Second, Esso argues that the plain language of *section 9613(f)(1)* makes clear that a civil action under

sections 106 or *107* is not necessary to maintain a contribution claim. Finally, Esso submits that co-defendants reliance on Aviall I is misplaced inasmuch as they overlooked the fact that the Fifth Circuit reversed its position after rehearing the case *en banc.*

I do not decide whether the issue was already resolved by the court in the previous opinion and order since it is not completely dear that the question was specifically considered. However, I agree with Esso that a prior or pending civil action under *sections 106* or *107* of CERCLA, is not a *sine qua non* for the survival of a contribution action. First, the co-defendants misplace their reliance on *Aviall Servs. Inc. v. Cooper Indus., Inc.; 263 F.3d at 134.* That case was reversed after a rehearing *en banc* by the Fifth Circuit in a decision filed on November 14, 2002. *Aviall Servs. Inc. v. Cooper Indus., Inc., 312 F.3d 677(5th Cir. 2002),* cert. granted, *540 U.S. 1099, 157 L. Ed. 2d 811, 124 S. Ct. 981 (2004)* (hereinafter "Aviall II"). In Aviall II the court held, after engaging in a statutory construction analysis, that *section 9613(f) of CERCLA,* specifically the last sentence in *section 9613(f)(1),* reveals Congress' intent that a contribution claim is not dependent on the existence of a prior or pending *sections 106* or *107* action. See *Aviall Servs. Inc. v. Cooper Indus.. Inc., 312 F.3d at 686.* The court phrased its reasoning in the following terms:

> The first point of disagreement between the dissent and the en banc majority is over the exclusivity of the claim for contribution described in the first sentence of § *113(f)(1).* Does its allowance of contribution actions "during or following" a § *106* or §

> *107(a)* civil action mean that contribution actions are "only" allowed in such circumstances? We think not. The dissent's interpretation of the first sentence of *§ 113 (f)* departs from "plain meaning" in several ways. "Only," for instance, is the word choice of the dissent, not of Congress, which characterized the actions permissively (a PRP "may" bring an action for contribution). Elsewhere in CERCLA, Congress used "only" many times, signifying its intent to narrow, exclude or define provisions. Had Congress similarly intended to make contribution actions available "only" after the referenced CERCLA lawsuits have been brought, it could have done so.

Id. (footnote omitted). The court concluded that its expansive reading of, *section 9613(f)(1)*, allowing a PRP to bring its contribution claim at whatever time in the cleanup process the party seeking contribution decides to pursue it, suits better the statutory text of said section. *Id. at 686 n.16.* Other federal courts presented with the issue have endorsed the same posture. See, e.g., *1325 "G" St. Assoc., LP v. Rockwood Pigments NA, Inc., 235 F. Supp. 2d 458, 464 (D. Md. 2002)*; *Niagara Mohawk Power Corp. v. Consol. Rail Corp., 291 F. Supp. 2d 105, 123 (N.D.N.Y. 2003).*

Second, the clear language of the statute itself reveals that a CERCLA contribution claim is not dependent on a prior action under *sections 106* or *107.* The last sentence of *section 9613(f)(1)* states that "nothing in this subsection shall diminish the right of any person to bring an action for contribution in the

absence of a civil action under *section 9606* of this title or *section 9607* of this title." *42 U.S.C. § 9613(f)(1)*. The Aviall II court observed that said sentence reveals Congress' intent not to make a contribution claim contingent on the existence of a prior *section 106* or *107* lawsuit. *Aviall Servs. Inc. v. Cooper Indus., Inc., 312 F.3d at 686*. In view of the above, I find that Esso's contribution claim is not precluded by the absence of a prior or pending *section 106* or *107* civil action. Therefore, this court has jurisdiction under CERCLA to entertain the merits of the contribution claim.

2. Covered Persons

The first element of a contribution claim under *section 9613(f)* is that the defendant be a "covered person" under CERCLA. There are four categories of covered persons that may be liable for contribution. They are,

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release...

42 U.S.C. § 9607(a); Dedham Water Co. v. Cumberland Farms Dairy, 889 F.2d at 1150-51.

Esso maintains that both Rodriguez and Belgodere were operators of the station. As to Rodriguez, Esso argues that his status as operator is evident from his own pleadings and testimony. He has admitted that he assumed control of the station from his father and that since 1971, he managed and controlled the day-to-day operations of the station. Rodriguez in fact entered into an agreement to lease the station in 1979. Furthermore, Esso claims that during the period he managed the station, Rodriguez directed the improper disposal of hazardous substances at the station premises. He also allegedly arranged for the irresponsible investigation conducted by Belgodere in August of 1998. Therefore, Esso contends that there is no factual dispute as to Rodriguez' status as operator of the station.

With respect to Belgodere, Esso's position is that he also qualifies as an operator. According to Esso, Belgodere directed and conducted inappropriate operations at the station related to pollution. Esso further claims that from August 1, 1998, until approximately February of 2000, Belgodere's control over the station extended to almost all management and activities related to environmental compliance. He exerted said control, Esso argues, to prevent and interfere with Esso's efforts to investigate and cleanup

the property. Among other things, Belgodere took it upon himself to report product release to the National Reponse Center. In addition, he was "in charge" and directed negligent drilling, soil boring and excavation work at the station. By his own statements and actions, Belgodere held himself out to others as being in control, denying Esso access to the property. Finally, Esso contends that Belgodere exerted control of the station by interfering in the remediation process with threats and harassment of Esso employees and representatives.

CERCLA's definition of an owner and operator has been characterized as useless when it defines for example an "operator" as "any person ... operating" the facility. *United States v. Bestfoods, 524 U.S. 51, 66, 141 L. Ed. 2d 43, 118 S. Ct. 1876 (1998)* (citing *42 U.S.C. § 9601(20)(A)(ii)*); see also *Am. Cyanamid Co. v. Capuano, 381 F.3d 6, No. 03-2143, slip op. at 36 (1st Cir. Aug. 18; 2004)* (observing that CERCLA defines the phrase owner and operator only by tautology). The Supreme Court has expanded, however, on the definition of an operator:

> an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

United States v. Bestfoods, 524 U.S. at 66-67.

In this case, both Rodriguez and Belgodere fit within the Supreme Court's definition of an operator. As to Rodriguez, it is clear from the evidence in the record that he directed the workings of, managed and conducted the affairs of the station. He in fact managed the station for a substantial period of time from the early 1970's when he assumed control from his father until 1998 when the station was ordered closed. As to Belgodere, he qualifies as an operator under the second part of the definition since he managed, directed and conducted operations related to pollution, specifically those having to do with the release of hazardous substances at the station and the compliance with environmental regulations. He reported product release and conducted drilling and excavation works. in relation to the gasoline spill at the station. He declared himself "in charge" of the station with enough authority to deny Esso representatives access to the property to perform remediation tasks. Belgodere is also alleged to have exerted control over the station by means of threats and harassment. n3

In any event, neither Rodriguez nor Belgodere submit any evidence or arguments to controvert Esso's position that they were operators of the station. They fail to create a factual dispute at the summary judgment stage on this issue. Therefore, I find that Esso has satisfied the first prong of the inquiry by showing that both Rodriguez and Belgodere are covered persons under CERCLA.

3. Release of Hazardous Substances at Defendant's Facility

Esso next needs to show that there was a release or threatened release of hazardous substances at the facility in question. The issue is comprised of two separate inquiries. First, there must be a release or threatened release of a "hazardous substance." Second, the property in question has to be a "facility" under CERCLA. I start with the simpler question: whether the station qualifies as a facility.

CERCLA defines "facility" as "(A) any building, structure, installation, equipment, ... or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located...." *42 U.S.C. § 9601(9)*; see also *United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986)* (quoting *United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985)*)("The term 'facility' should be construed very broadly to include 'virtually any place at which hazardous wastes have been dumped, or otherwise disposed of.'"); *United States v. Tropical Fruit, S.E., 96 F. Supp. 2d 71, 84 (D.P.R. 2000)*.

The term facility is defined broadly under CERCLA and it has been interpreted by the cases to encompass any conceivable place where a hazardous substances is dumped or disposed of. Consequently, although the co-defendants present no argument to challenge Esso's position that the station qualifies as a facility, the question must be answered with reference to whether there was a release or threatened release of a hazardous substance at the station. To that proposition the co-defendants voice their most vigorous objection. They claim that under CERCLA's "petroleum exception," Esso is precluded from arguing that there was a release of hazardous substances at the premises.

The co-defendants' position is in general that gasoline, diesel and oil are specifically excluded from CERCLA's definition of a hazardous substance. Esso disagrees adducing that the releases at the station do not fall within the petroleum exclusion because said exception does not apply to hazardous substances added to the petroleum products during use.

The term "release" is defined by CERCLA as:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)...

42 U.S.C. § 9601(22). CERCLA defines "hazardous substances" as:

> (A) any substance designated pursuant to *section 1321(b)(2)(A) of Title 33*, (B) any element, compound, mixture, solution, or substance designated pursuant to *section 9602* of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to *section 3001 of the Solid Waste Disposal Act* (but not including any waste the regulation of which under the *Solid Waste Disposal Act* has been suspended by Act of Congress), (D) any toxic pollutant listed under *section 1317(a) of Title 33*, (E) any hazardous air pollutant

> listed under *section 112 of the Clean Air Act*, and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 14.

42 U.S.C. § 9601(14). The Environmental Protection Agency (hereinafter "EPA") has promulgated a list of elements, compounds and hazardous wastes that are designated hazardous substances pursuant to CERCLA's definition. See *40 C.F.R. § 302.4* and Table 302.4. Among the listed substances are lead, chromium, benzene, ethylbenzene, toluene and xylene, which are some of the substances found at the station. Id.

However, petroleum is specifically excluded from the definition of hazardous substances. *Section 101(14) of CERCLA* states in relevant part that "the term [hazardous substances] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph...." *42 U.S.C. § 9601(14)*. It has been held that CERCLA's petroleum exclusion applies to refined and unrefined petroleum products even though some of the indigenous components and the additives added during the refining process have themselves been designated as hazardous substances. See *Wilshire Westwood Assocs. v. Atl. Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989)*. The exclusion is inapplicable when said indigenous components are found in excess of the amounts that would have resulted from the refining process or when they are added to the petroleum product during or after use. *United States v. Alcan Aluminum Corp., 964 F.2d 252,*

266-67 (3rd Cir. 1992); see also *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 541 (6th Cir. 2001)* ("Petroleum products mixed with hazardous substances not constituent elements of petroleum are hazardous substances."). Through its rulings and memorandums, EPA has reaffirmed this position interpreting the exclusion to apply to materials such as crude oil, petroleum feedstocks and refined petroleum products even if a specifically listed or designated hazardous substance is present in said product. The exclusion does not apply, however, to materials such as waste oil to which a listed hazardous substance has been added. See 50 Fed. Reg. 13,460; *Cose v. Getty Oil Co., 4 F.3d 700, 704 (9th Cir. 1993)*. In other words, the exclusion is inapplicable to released petroleum products where the concentration of hazardous substances is higher than their concentration in the virgin product, *Organic Chem. Site PRP Group v. Total Petroleum, Inc., 58 F. Supp. 2d 755, 763 (W.D. Mich.. 1999)*, or where the hazardous substance is added to the petroleum product during use. *New York v. Exxon Corp., 766 F. Supp. 177, 186-87 (S.D.N.Y. 1991)*. The party claiming the benefit of the petroleum exception has the burden of proving that he or she falls within the exception's scope. *Ekotek Site PRP Comm. v. Self, 932 F. Supp. 1319, 1323 (D. Utah 1993)*.

Esso maintains that hazardous substances in waste oil and in used automobile parts were disposed of on the property, along with gasoline, which became contaminated in the course of washing operations. Esso further contends that used motor oil became contaminated through use by: chemical reactions during the combustion process; absorption of fuel combustion

products, blow-by gasoline and coolant; and wear of engine products. Additionally, Esso claims that the dumping on the ground of diesel fuel and gasoline contaminated by dirt and grease washed off cars and by the cleaning of greasy hands, led to contamination of the station with hazardous substances. Thus, according to Esso, the petroleum exclusion is inapplicable as a matter of law.

Belgodere responds that Esso has not been able to produce any scientific data to sustain its allegations. According to Belgodere, Esso has only presented scientific evidence demonstrating the presence of gasoline, diesel and their fractions which are specifically exempted from the definition of hazardous substances. Rodriguez and Ortiz join Belgodere in these arguments. Specifically, it is alleged by Belgodere that lead for instance was found at the station in background quantities, that is, in a concentration normally found in the environment. In addition, Belgodere claims that laboratory analyses of the soil at the station were negative or below detectable limits for both chromium and Polychlorinated Biphenyl.

The First Circuit has held that there is no minimum quantity threshold for the imposition of liability on polluters. *United States v. Davis, 261 F.3d at 52* (citing *Acushnet Co. v. Mohasco Corp., 191 F.3d at 76*). "In an appropriate set of circumstances, a tortfeasor's fair share of the response costs may even be zero Id. This is so because CERCLA does not distinguish between releases or threats of releases by the quantity of hazardous waste attributable to a particular party. *Acushnet Co. v. Mohasco Corp., 191 F.3d at 76.* The issue is whether there has been *any* release or threat of release at the station of hazardous substances that

although indigenous to a petroleum product, are found in concentrations higher than otherwise found in the product be it refined or unrefined or added to the petroleum product through use. If this question yields a positive answer, then it follows that liability may be imposed on the covered persons, see *United States v. Davis, 261 F.3d at 52*, and that the petroleum exclusion does not apply to the circumstances of this case.

The evidence in the record shows undisputably that listed hazardous substances were found at the station premises. Among them, lead and chromium were found in amounts that contrary to co-defendants' assertions, exceed background concentrations. For instance, recent soil testings revealed the presence of lead in concentrations as high as 885ppm. (See Rebuttal Expert Report of Robert M. Zoch, Jr., Docket No. 231, Ex. 46, at 4-5.) This concentration was found in a soil sample taken from the station's oil change pit outfall to the Pinonas River. (Docket No. 231, at 5.) Similarly, recent samples taken from the station revealed chromium concentrations ranging from 232ppm to 607ppm. (Id.) Based on these findings, Esso's expert, Mr. Robert M. Zoch, Jr. , disagreed with co-defendants' argument that designated hazardous substances were found at the station's premises only in amounts below the background concentration levels. Zoch concluded, taking into consideration the area in which the elevated pollution concentrations were found, that the same were related to contaminant substances added to the used motor oil disposed of at the station. (Id.) In addition, Zoch concluded that the pollutants found in the oil change area were indicative of wear metals introduced into engine oil. The hands and parts washing locations at the station also exhibited an increased level

of hazardous substances according to Zoch. (Id.) Finally, Zoch stated that the above referenced data supported his opinion that the operations directed and performed under the management of the co-defendants caused the further migration of hazardous substances like lead and chromium at the station.

Belgodere relies on the Phase III/IV Site Assessment of the station prepared by ERTEC and submitted on February of 2002 (Docket No. 236, Ex. 3) for his proposition that hazardous substances were found at the station either below detectable limits or within background concentrations. However, the elevated levels of hazardous substances at the station were found in what Zoch described in his rebuttal report as recent soil testings performed in 2003 as part of the remediation activities supervised by the EQB. (Docket No. 231, Ex. 46, at 4.) The co-defendants present nothing to controvert the data concerning the higher levels of hazardous materials and their direct correlation to the oil changing activities performed at the station for years.

It has been held that spilling virgin motor oil on the ground cannot under the petroleum exclusion of CERCLA be considered a release of a hazardous substance; however, spilling used motor oil containing substances not found in virgin motor oil almost certainly is. *Darton Corp. v. Uniroyal Chem. Co., 917 F. Supp. 1173, 1183 (N.D. Ohio 1996)*; see also *United States v. Alcan Aluminum Corp., 964 F.2d at 266* (citing 50 Fed. Reg. 13,460) ("EPA does not consider materials such as waste oil to which listed CERCLA substances have been added to be within the petroleum exclusion."). In this case, it was concluded by Esso's expert that automobile crankcase oil, such as the one

handled in oil changing operations at the station, is contaminated by wear metals and fuel residues and that its composition was altered by oxidation. (Docket No. 231, Ex. 46, at 7.) Furthermore, the normal use of engine oil adds hazardous substances not excluded by CERCLA's petroleum exclusion. (Id.) Once again, the co-defendants fail to controvert any of these conclusions. Therefore, I hold that the co-defendants have not meet their burden of showing that they fall under the scope of the petroleum exclusion. *Foster v. United States, 926 F. Supp. 199, 205-06 (D.D.C. 1996)* (holding that a defendant must controvert the plaintiff's allegations concerning the hazardous composition of the petroleum product in order to take advantage of the exemption). Simply put, there was a release of hazardous substances at the station.

To the extent that the co-defendants may be arguing that they should escape liability as *de minimis* polluters, they are reminded of the First Circuit's admonition in *Acushnet Co. v. Mohasco Corp., 191 F.3d at 77-78.* In that case, the court of appeals held that:

> a defendant may avoid joint and several liability for response costs in a contribution action under § *9613(f)* if it demonstrates that its share of hazardous waste deposited at the site constitutes no more than background amounts of such substances in the environment and cannot concentrate with other wastes to produce higher amounts. This rule is not based on CERCLA's causation requirement, but is logically derived from § *9613(f)*'s express authorization that a court take equity into

> account when fixing each defendant's fair share of response costs.

Id. In view of this, it is clear that the co-defendants erroneously assert that they are not liable as a matter of law for any response costs. First, it has already been determined that the co-defendants disposed of hazardous substances at the station and that such substances appear in levels exceeding background amounts. Second, any argument regarding the particular amounts of contaminants attributable to each co-defendant goes to the question of the equitable factors that the court must consider in the allocation of response costs. Since the present matter only relates to the issue of liability for contribution, the determination of each co-defendants' fair share of response is not now before the court.

4. Response Costs

For the imposition of contribution liability under CERCLA, the court also needs to determine whether the party seeking contribution incurred in response costs as a result of the release and whether said costs were necessary and consistent with the NCP. n4 As to this issue, the record establishes that Esso has indeed incurred in response costs as part of the remediation efforts undertaken at the station. Esso submits that between August of 1998 and October of 2003, it incurred in costs totaling $ 10,585,974. (Zoch's Report, Docket No. 231, at 23, Ex. 46.) Such amount includes, according to Esso, the costs of preliminary site assessment/remediation plan, supplemental investigations, an engineering/remediation plan, site remediation, and site management. (Id.) Esso further contends that these response costs were necessary and

consistent with the NCP. They were necessary, Esso maintains, because they were incurred principally in compliance with EQB's administrative orders and concerns. They were consistent with the NCP because in incurring in these costs, Esso and its contractors considered all of the NCP requirements such as workers' safety and health and remedy evaluation and selection. The co-defendants do not dispute any of these contentions.

I find that the costs incurred by Esso in the performance of remediation activities at the station by reason of the release of hazardous substances were at least in part necessary response costs under CERCLA. n5 I also find that these costs were consistent with the NCP in the absence of an attempt by the co-defendants to create a factual dispute on the issue. The rule is that remedial and removal actions generating response costs must be consistent with the NCP in order to be recoverable under CERCLA. *Carson Harbor Vill., Ltd. v. Unocal Corp., 287 F. Supp. 2d 1118, 1152 (C.D. Cal. 2003)*. Under EPA regulations, a private response action is deemed consistent with the NCP if the action evaluated as a whole is in "substantial compliance" with certain NCP procedural requirements and if it constitutes a "CERCLA-quality cleanup." *Pichowicz v. Atlantic Richfield, 37 F. Supp. 2d 98, 101 (D.N.H. 1997)* (citing *40 C.F.R. § 300.700(c)(3)(i)*). In addition, it has been held that oversight and approval of remediation plans by a state agency is sufficient to satisfy the requirement of consistency with the NCP. See, e.g., *Nutrasweet Co. v. X-L Eng'g Co., 227 F.3d 776, 790 (7th Cir. 2000)*; *Bedford Affiliates v. Sills, 156 F.3d 416, 428 (2nd Cir. 1998)*; *Norhtfolk S. Ry. Co. v. Gee Co., 158 F. Supp. 2d 878, 883 (N.D. III. 2001)*; *Sherwin-Williams*

Co. v. Artra Group, Inc., 125 F. Supp. 2d 739, 752 (D. Md. 2001); *Am. Color & Chem. Co. v. Tenneco Polymers, Inc., 918 F. Supp. 945, 957 (D.S.C. 1995).* Here, most if not all of the remediation work performed at the station was under the approval and monitoring of the EQB, a state administrative agency dealing with environmental issues. Therefore, I find that the response costs incurred by Esso were consistent with the NCP.

5. Other Grounds Raised in Support of Partial Summary Judgment

Rodriguez and Ortiz raise several other grounds in support of their contention that summary judgment on the issue of CERCLA liability should be granted in their favor. Specifically, these co-defendants maintain that the present action is barred by: the applicable. statute of limitations; *res judicata;* waiver; and the equitable doctrine of laches. Finding that the grounds argued either have no merit, have already been decided or are asserted in a perfunctory manner, I find it unnecessary to address them in a lengthy discussion. As such, there being no dispute as to any material fact and finding that Esso is entitled to judgment as a matter of law on the question of liability for contribution under CERCLA, Esso's motion for partial summary judgment is GRANTED. It follows that co-defendants Belgodere, Rodriguez and Ortiz' cross-motions for summary judgment are DENIED.

B. Esso's Motion for Summary Judgment: Co-defendants' Counterclaim

On July 8, 2002, co-defendants Rodriguez and Ortiz filed a counterclaim against Esso along with their answer to the complaint. (Docket No. 50.) In it, they

assert claims for: (1) lost income; (2) lost future income; (3) lost gasoline; (4) slander; (5) attorney's fees incurred in defending themselves before the EQB; (6) mental anguish; and (7) injunctive relief. (Id.) Esso contends that summary judgment is warranted with respect to co-defendants' negligence and defamation claims inasmuch as they are barred by Puerto Rico's one-year statute of limitation. In the alternative, Esso maintains that the co-defendants have failed to establish claims for loss of past and future income, mental anguish, defamation and attorney's fees. As to the claim for injunctive relief, Esso argues that the same has become moot.

The co-defendants failed to submit an opposition to Esso's motion for partial summary judgment. However, such failure is not conclusive. *Lopez v. Corporacion Azucarera de P.R., 938 F.2d 1510, 1517 (1st Cir. 1991).* To the contrary, "the failure of the nonmoving party to respond to a summary judgment motion does not in itself justify summary judgment." Id. "The district court [is] still obliged to consider the motion on its merits, in light of the record as constituted, in order to determine whether judgment would be legally appropriate." *Mullen v. St. Paul Fire & Marine Ins. Co., 972 F.2d 446, 452 (1st Cir. 1992)* (quoting *Kelly v. United States, 924 F.2d 355, 358 (1st Cir. 1991)*); see also *Empress Hotel Inc. v. Puerto Rico, 218 F. Supp. 2d 189, 197 (D.P.R. 2001).* In fact, before granting summary judgment the court must make sure that the moving party has met its burden of demonstrating that there are undisputed facts entitling that party to judgment as a matter of law. *Jaroma v. Massey, 873 F.2d 17, 20 (1st Cir. 1989).*

1. Negligence and Defamation: Statute of Limitations

Under article 1869 of the Puerto Rico Civil Code, an action prescribes in one year if it is an "action[] to demand civil liability for grave insults or calumny, [or] for obligations arising from the fault or negligence mentioned in *§ 5141* of this title, from the time the aggrieved person had knowledge thereof." *31 P.R. Laws Ann. § 5298(2)*. The Puerto Rico Supreme Court has incorporated into the statute a "discovery rule" under which a claim accrues -- and the limitations period starts to run -- not at the time of the injury but when the injured party discovers the same and its author. *Gonzalez-Perez v. Hosp. Interamericano de Medicina Avanzada (HIMA), 355 F.3d 1, 2 (1st Cir. 2004)* (citing *Espada v. Lugo, 312 F.3d 1, 5 (1st Cir. 2002)*). In other words, the injured person must have notice of the injury and knowledge of the likely identity of the tortfeasor. *Espada v. Lugo, 312 F.3d at 3* (citing Tokyo Marine & Fire Ins. Co. v. Perez y *Cia. de P.R., Inc., 142 F.3d 1, 3 (1st Cir. 1998)*). Actual knowledge is not necessary when the knowledge would have been acquired in the exercise of due diligence. *Espada v. Lugo, 312 F.3d at 4*. As to the notice of the injury requirement, the same "occurs when there 'exist some outward or physical signs through which the aggrieved party may become aware and realize that he has suffered an injurious aftereffect, which when known becomes a damage even if at the time its full scope and extent cannot be weighed.'" *Torres v. E.I. Dupont de Nemours & Co., 219 F.3d 13, 19 (1st Cir. 2000)* (quoting *Kaiser v. Armstrong World Indus., Inc., 872 F.2d 512, 516 (1st Cir. 1989)*). On the other hand, the second prong is satisfied when a plaintiff knows or should have

known, by exercising the degree of diligence required by law, whom to sue. *Kaiser v. Armstrong World Indus., Inc., 872 F.2d at 516.* What is required in terms of knowledge of the author is "some level of reasonable likelihood of legal liability on the part of the person or entity that caused the injury...." *Rodriguez-Suris v. Montesinos, 123 F.3d 10, 13-14 (1st Cir. 1997).*

A claim for defamation is subject to the same standard; namely that the claim accrues at the time the person injured by a defamatory statement learns of the same. *Ojeda v. El Vocero de P.R., 137 D.P.R. 315, 335, 1994 Juris P.R. 131 (1994); Santiago v. Lloyd, 33 F. Supp. 2d 99, 105 (D.P.R. 1998).* It is at that time that the one-year statute of limitations starts to run.

In this case, the general allegations in the counterclaim arise out of the contractual relationship between Esso and the co-defendants by which the latter provided the Underground Storage Tanks ("USTs") used at the station operated by the former. Esso allegedly failed to respond to numerous complaints regarding problems with the USTs that ultimately resulted in product release at the premises. The co-defendants specifically aver in their counterclaim that "Plaintiff [Esso], intentionally and or negligently, ignored Defendant Rodriguez notices [sic] of equipments [sic] problems that resulted in the contamination of the surrounding soils, river and groundwater, with leaded, unleaded and diesel [sic]." (Docket No. 50, at 9, P 4.)

Co-defendants Rodriguez and Ortiz' lost income, lost future income, lost gasoline claims and the defamation cause of action all sound in tort, and are thus covered by Puerto Rico's one-year statute of limitations. The

record establishes that co-defendants knew well before July 8, 2001 (that is one-year prior to the filing of the counterclaim), that there had been a release of gasoline at the station. Their own allegations show that they had been complaining to Esso about problems with the UST system for years. In addition, the evidence in the record demonstrates that on March 10, 1997, Belgodere called the NRC and reported the alleged loss of 80,000 gallons of gasoline at the station. That call was made in the presence of Rodriguez who in turn blames Esso for such product release. Consequently, it is clear that the co-defendants knew at least since March 10, 1997 about the loss of gasoline at the station and therefore about the injury causing the alleged lost of income and the identity of the tortfeasor. They had until March 10, 1998 to file their claim. Furthermore, even if the court were to conclude that the co-defendants commenced to suffer loss of income at the time the station was closed in August of 1998, it would still be the opinion of the court that such claim is time-barred. The same rationale applies to the claim of lost future income. The co-defendants lost their ability to earn income at the time the station was closed in August 1, 1998. They knew that the reason the station was closed was due in part by problems related to the gasoline spill at the station which they maintain was caused by Esso's alleged negligent actions. Accordingly, they had one year to bring their counterclaim, that is until August 1, 1999. By failing to do so, and bringing such claims on July 8, 2002 as part of their counterclaim, there is no factual controversy that said claims are barred by the applicable one-year statute of limitations. Therefore, summary judgment is warranted as to all claims based on negligence including mental anguish. n6

Co-defendants' defamation claim fares no better. Since the co-defendants have not opposed Esso's motion for summary judgment, the court is left with Esso's own characterization regarding the nature of the alleged defamatory statement. According to Esso, the defamatory statements for which the co-defendants now seek damages relate to two separate incidents. First is the report of a contractor hired by Esso who submitted an allegedly false memorandum to the Puerto Rico Department of Justice in September of 1998. The memorandum apparently contained a declaration by said contractor that Rodriguez had intimidated him during an altercation that occurred at the station in early August of 1998. Second is the claim of a defamatory statement contained in a letter to the public that Esso published in El Nuevo Dia on October 16, 1999. Given the dearth of evidence tending to dispute that the co-defendants acquired knowledge of the defamatory statements at dates subsequent to the actual publication of these statements, it is clear from the record that co-defendants' defamation claims are time-barred. See *Ojeda v. El Vocero de P.R., 137 D.P.R. at 336-37.* Such determination is made taking the facts in the light most favorable to the co-defendants and assuming that they have alleged enough to state viable defamation claims. Esso's motion for summary judgment with respect to this issue is GRANTED. n7

2. Attorney's Fees

The co-defendants allege in their counterclaim that "due to Plaintiff . [sic] intentional or negligent omission to correct the equipment problems, Defendants Carlos Rodriguez, Carmen Ortiz and their conjugal partnership have been forced to retain counsel and consultants, investing and or obligating [sic] in excess

of $ 150,000.00 in order to defend themselves at the Puerto Rico Environmental Quality Board." (Docket No. 50 at 9, P 9.) Esso in turn contends that under Puerto Rico law, an award of attorney's fees usually follows a finding that the party ordered to pay such an award acted obstinately. According to Esso, it has already been recognized in this case -- when the court denied co-defendants' motion to dismiss -- that Esso's CERCLA contribution claim was not frivolous. Esso also maintains that there is enough evidence in the record to support a conclusion that the co-defendants are liable for contribution under CERCLA and that Esso has prosecuted its case diligently. Therefore, Esso argues that absent frivolousness or obstinacy, an award of attorney's fees to the co-defendants should as a matter of law be denied.

In Puerto Rico, awards of attorney's fees are governed by Rule 44.1(d) of the Puerto Rico Rules of Civil Procedure. Rules 44.1(d) provides in relevant part that "in the event any party or its lawyer has acted obstinately or frivolously, the court shall, in its judgment, impose on such person the payment of a sum for attorney's fees which the court decides corresponds to such conduct." 32 P.R. Laws Ann. App. III Rule 44.1(d). The Puerto Rico rules do not define the term obstinacy. *Correa v. Cruisers, A Div. of KCS Int'l, Inc., 298 F.3d 13, 30 (1st Cir. 2002).* However, it has been held, based on Puerto Rico caselaw, that a finding of obstinacy requires a determination that a party "[has] been unreasonably adamant or stubbornly litigious, beyond the acceptable demands of the litigation, thereby wasting time and causing the court and the other litigants unnecessary expense and delay." *De Leon Lopez v. Corporacion Insular de Seguros, 931*

F.2d 116, 126 (1st Cir. 1991). The purpose of the rules is to "'impose a penalty upon a losing party that because of his stubbornness, obstinacy, rashness, and insistent frivolous attitude has forced the other party to needlessly assume the pains, costs, efforts, and inconveniences of a litigation.'" *Top Entm't Inc. v. Torrejon, 351 F.3d 531, 533 (1st Cir. 2003)* (quoting *Fernandez Marino v. San Juan Cement Co., 18 P.R. Offic. Trans. 823, 830, 18 P.R. Dec. 713 (1987)*). The imposition of attorney's fees is mandatory once the court determines that one of the parties incurred in obstinate conduct. *Correa v. Cruisers, A Div. of KCS Int'l, Inc., 298 F.3d at 30.*

Nothing in the record supports a finding of obstinacy on the party of Esso that would justify an award of attorney's fees. Esso correctly points out that the court denied a motion to dismiss (treated as a motion for summary judgment) filed by co-defendant Belgodere. In its opinion and order (Docket No. 170), the court concluded that issues of material fact in dispute precluded the entry of summary judgment. Such determination, in and of itself, negates a finding of frivolousness on the part of Esso. Additionally, the court has already determined that the co-defendants are liable to Esso under CERCLA's contribution provision. Having failed to create a factual dispute regarding this issue, I find that the co-defendants are precluded from recovering attorney's fees from Esso inasmuch as the record does not support a finding of obstinacy. As to this issue, Esso's motion for summary judgment is also GRANTED.

3. Injunctive Relief

Finally, Esso contends that summary judgment is appropriate with respect to co-defendants' request for injunctive relief. In their counterclaim, the co-defendants asserted the following: "Plaintiff should be ordered to correct immediately all contamination and to refurnish the service station so that Defendants Carlos Rodriguez and Carmen Ortiz can continue operating their business free of any environmental problem." (Docket No. 50 at 10, P 11.) Esso argues that such request should be denied as moot because Esso already is actively engaged in an approved investigation and remediation of the station. In fact, Esso has proceeded with remediation work under EQB orders since 1998. Thus, according to Esso, the court can provide no relief to the defendants that is not already being provided by Esso pursuant to EQB's remediation orders.

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's AM., 529 U.S. 277, 287, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000)* (quoting *County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979)*). In their very general request for injunctive relief, the co-defendants ask for something that is already being performed pursuant to the orders and the supervision of the EQB. And once again, having failed to meet their burden on summary judgment by failing to present evidence or arguments in their favor, the co-defendants fail to show that there is a factual dispute regarding the injunctive relief requested. Because the issue has become moot, I find that judgment as a matter of law is warranted with respect to co-defendants' request for injunctive relief. Therefore, as to this issue, Esso's motion for summary judgment is also GRANTED.

IV. CONCLUSION

In view of all of the above, I find that Esso has establish the absence of genuine issues of material fact as to co-defendants' liability for contribution under CERCLA. Accordingly, Esso's motion for partial summary judgment on said question is GRANTED. The motions for summary judgment filed by co-defendants Belgodere, Rodriguez and Ortiz on the same issue are DENIED. Esso is also entitled to judgment as a matter of law on the counterclaim filed by Rodriguez and Ortiz. Therefore, Esso's motion for summary judgment on that issue is also GRANTED.

SO ORDERED

In San Juan, Puerto Rico this 1st day of October, 2004

JUSTO ARENAS

Chief United States Magistrate Judge

Footnotes

n1 Comprehensive Environmental Response, Compensation and Liability Act, *42 U.S.C. § 9601 et seq.*

n2 CERCLA provides a circular definition of owner and operator: "(ii) in the case of an onshore facility or an offshore facility, *any person owning or operating such facility...*" *42 U.S.C. § 9601(20)(A)(ii).*

n3 For a more detailed discussion of Belgodere's conduct in relation to the station and the La Vega community, see the findings of fact section in *Esso Standard Oil Co. (P.R.) v. Mujica-Cotto, 327 F. Supp. 2d 110, 123-24 (D.P.R. 2004).*

n4 Response costs include removal and remedial actions aimed at remedying immediate threats of public health and safety caused by hazardous substances and directed at long-term or permanent remediation of the contamination. See *42 U.S.C. § 9601(23)-(25)*; *In re Hemingway Transp. 993 F.2d 915, 931 n.19 (1st Cir. 1993)*.

n5 I say "at least in part" because the question is highly factual and at this stage, where the court is simply considering the issue of liability, I am in no position to conclude that all the costs incurred were necessary. This question will be addressed in the allocation of response costs phase.

n6 Rodriguez knew at least since September 22, 2000, when he visited Dr. Jaime A. Rivera and complained of anxiety and insomnia, that he was suffering from some degree of mental anguish. The record also establishes that even prior to 1998, Rodriguez suffered from some kind of mental problems that were aggravated by the closure of the station in 1998. Such claim is dearly barred by the statute of limitations.

n7 Having found that co-defendants' claims alleging negligent conduct and defamation are time-barred, I find it unnecessary to address the merits Esso's alternative arguments that such causes of action fail as a matter of law.

Filed 10/28/06
No. 05-1722
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ESSO STANDARD OIL COMPANY (Puerto Rico), a Puerto Rico Corporation,
Plaintiff, Appellee,

v.

CARLOS E. RODRIGUEZ-PEREZ; CARMEN ORTIZ-LOPEZ; CONJUGAL PARTNERSHIP RODRIGUEZ-ORTIZ,
Defendants, Third-Party Plaintiffs, Appellants,

CARLOS M. BELGODERE-PAMIES; JANET ROE; CONJUGAL PARTNERSHIP BELGODERE-ROE,
Defendants,

ESTATE OF PAGAN-PAGAN,
Third-Party Defendant, Appellee.

JUDGES: Before Lipez and Howard, Circuit Judges, and Bowman, * Senior Circuit Judge.

ORDER OF THE COURT

In light of the petition for rehearing, the panel of judges who decided the case is of the view that the opinion should be amended to clarify a point raised in the petition for rehearing. The amendment is reflected in the attached errata sheet whose filing is ordered by the panel, the opinion is hereby amended by the panel, and the petition for rehearing is otherwise denied.

Footnotes

* Of the Eighth Circuit, sitting by designation.